

United States

Circuit Court of Appeals

For the Ninth Circuit

LEON L. MOISE,

Petitioner,

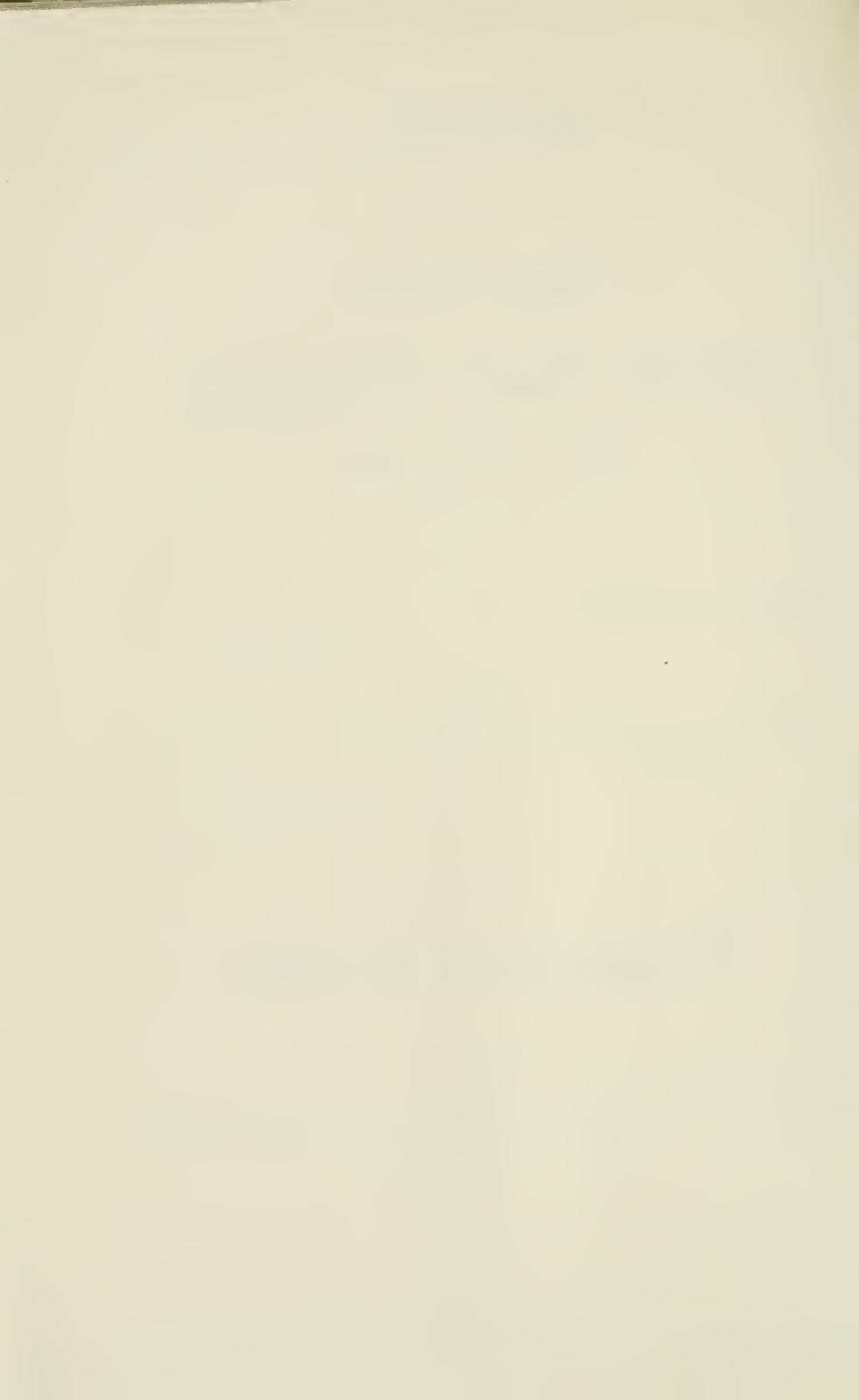
vs.

DAVID BURNET, Commissioner of Internal
Revenue,

Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States
Board of Tax Appeals.



No. 6179—INDEX TO TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*] DOCKET No. 7453.

LEON L. MOISE, Flood Bldg., San Francisco,
Calif.,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES.

For Petitioner: JEROME H. BAYER, Esq.

J. S. Y. IVINS, Esq.

For Respondent: T. M. MATHER, Esq.

A. H. MURRAY, Esq.

DOCKET ENTRIES.

1925.

Sept. 24—Petition received and filed.

Sept. 28—Copy of petition served on Solicitor.

Sept. 28—Notification of receipt mailed taxpayer.

Oct. 10—Request for field hearing filed by taxpayer.

Oct. 19—Answer filed by Solicitor.

Oct. 29—Copy of answer served on taxpayer. As-
signed to field calendar.

1927.

Feb. 25—Hearing set April 29, 1927, San Fran-
cisco, Calif.

Apr. 7—Motion to amend answer filed by General
Counsel, amendment tendered.

Apr. 8—Granted. Both sides notified.

*Page-number appearing at the top of page of original certified
Transcript of Record.

- Apr. 21—Notice of withdrawal of W. M. Smith filed.
- Apr. 21—Notice of appearance of Jerome H. Bayer filed.
- Apr. 27—Order consolidating this appeal with docket #7455, #8036 and #7454, said appeals to be heard and decided together in San Francisco, Cal., May 3, 1927, and placed on Circuit Cal. signed and filed. Both sides notified.
- May 4—Hearing had before Mr. Van Fossan, on petitioner's motion to continue. Denied. Motion to amend petition granted. *(Petitioner's motion to dismiss except year 1920, granted.) Four cases ordered consolidated. Parties allowed until 7/1/27 to file Briefs without exchange.
- June 13—Transcript of hearing May 4, 1927, filed.
- June 25—Brief filed by taxpayer.
- 1928.
- Sept. 25—Findings of fact and opinion rendered—Mr. Littleton—Judgment will be entered Rule 50.
- Nov. 12—Notice of proposed redetermination, filed by G. C.
- Nov. 14—Hearing set Dec. 12th on settlement.
- Dec. 12—Hearing had before Mr. Milliken on settlement under Rule 50. Assigned to Mr. Littleton for order.
- Dec. 15—Order of redetermination entered.

*Stricken by order of June 10, 1930.

1929.

June 7—Notice of appearance of J. S. Y. Ivins as counsel for taxpayer filed.

[2] #7453.

June 7—Motion to fix the amount of bond at \$13,500.00, filed by taxpayer.

June 7—Order fixing amount of bond at \$18,000, entered.

June 11—Supersedeas bond for \$18,000, approved and ordered filed.

June 11—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.

June 13—Proof of service of petition for review filed.

June 17—Ordered that petitioner's amended petition submitted in #7453-54 be received and filed *nunc pro tunc* as of May 4, 1927—entered.

July 29—Motion for extension to Oct. 12, 1929, for preparation and transmission of statement of evidence, filed by taxpayer.

July 30—Order enlarging time to Oct. 12, 1929, for preparation and delivery of record—entered.

Sept. 11—Motion for extension to Nov. 25, 1929, for preparation of evidence and transmission of record filed by taxpayer.

Sept. 12—Order enlarging time to Nov. 25, 1929, for preparation and delivery of record papers entered.

- Nov. 2—Motion for extension to Jan. 10, 1930, to prepare and deliver statement of evidence—filed by taxpayer.
- Nov. 6—Order enlarging time to Jan. 10, 1930, for preparation of evidence and delivery of record papers entered.

1930.

- Jan. 2—Order from U. S. Circuit Court of Appeals (9) enlarging time to Feb. 10, 1930, for preparation and delivery of record filed.
- Feb. 10—Motion for extension to March 10, 1930, for settlement of evidence and transmission of record filed by G. C.
- Feb. 12—Praecipe with proof of service thereon filed.
- Feb. 12—Agreed statement of evidence lodged. Approved and ordered filed Feb. 15, 1930.
- Feb. 10—Order enlarging time to May 1, 1930, for preparation of evidence and transmission and delivery of record entered.
- Mar. 8—Transcript of record *sur* petition for review sent to Clerk U. S. Circuit Ct. of Appeals, Ninth Circuit.
- May 2—Certified copy of order enlarging time to June 2, 1930, to prepare and deliver record filed.
- June 2—Copy of order from U. S. Circuit Court of Appeals, Ninth Circuit, granting extension to July 1, 1930, to prepare and deliver record filed.

June 10—Motion to correct docket entry of May 4, 1927, filed by taxpayer. Granted.

Now, June 11, 1930, the foregoing docket entries are certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, Board of Tax Appeals.

[Endorsed]: Filed Jul. 1, 1930. Paul P. O'Brien, Clerk.

[3] Filed Sept. 24, 1925.

United States Board of Tax Appeals.

DOCKET No. 7453.

Appeal of LEON L. MOISE, Flood Building, San Francisco, Calif.

PETITION.

The above-named taxpayer hereby appeals from the determination of the Commissioner of Internal Revenue set forth in his deficiency letter IT:PA: 4-60-D-GWF-406 dated July 29, 1925, and as the basis of his appeal sets forth the following:

1. The taxpayer is an individual with his place of business in the Flood Building, San Francisco, California. He was formerly a member of the copartnership Schlesinger and Bender with its principal office at the same address.
2. The deficiency letter (a copy of which is attached) was mailed to the taxpayer on July 29, 1925.

3. The taxes in controversy are income taxes for the calendar years 1918, 1919 and 1920 and are less than \$10,000.00, to wit, \$1,379.78, excepting for any adjustment which will be rendered necessary upon the Treasury Department's acceptance of California taxpayers' returns filed on a community property basis.
4. The determination of tax contained in the said deficiency letter is based upon the following error:
 - (a) Failure by the Commissioner to allow as a deduction from income in the tax returns filed by Schlesinger and Bender a loss amounting to \$13,947.42 sustained in the calendar years 1918, 1919 and 1920, due to the enactment of prohibition legislation, thus increasing the *pro rata* share of partnership income taxable to the taxpayer.
5. The facts upon which the taxpayer relies as the basis of his appeal are as follows:
 - (a) In its tax return for the six months period ending December 31, 1918, the copartnership Schlesinger and Bender claimed as a deduction the sum of \$21,848.60 as exhaustion wear and tear (including obsolescence) of tangible properties. This sum consisted of the following balances:
 - [4] Unamortized balance of build-ings on leased ground account. . . . \$ 7,200.00

Balance of cooperage, furniture and fixtures account.....	13,965.03
Additional depreciation not charged on books (details not now available).	683.57
Total as above.....	<u>\$21,848.60</u>

(b) In its tax return for the calendar year 1920 the copartnership of Schlesinger and Bender reported as income the sum of \$7,801.18 being the total proceeds from the sales of cooperage, scrap and office furniture.

(c) The Commissioner in his letter dated October 22, 1924, file IT:PA:4-GWF-406 allowed as a deduction to Schlesinger and Bender obsolescence of goodwill amounting to \$52,814.70 apportionable between the years 1918, 1919 and 1920 as follows:

1918	12/37	\$17,129.09
1919	24/37	34,258.19
1920	1/37	1,427.42

As above.....\$52,814.70

(d) The deduction mentioned in paragraph 5 (a) above as originally claimed by the copartnership was in error and, as in paragraph 4 above, the correct deductible amount is \$13,947.42 made up as follows:—

Unamortized balance of buildings on

leased ground, reverted to lessor January 16 1920.....			\$ 7,2
Cooperage, furniture, fixtures etc., book value.....		\$13,965.03	
Less:			
Proceeds of sales originally reported as income in the year 1920....		\$7,801.18	
Estimated value of office furniture retained	100.00	7,901.18	6,0
		<hr/>	<hr/>
Additional depreciation not charged in books. The details of this item are not now available but the amount is reasonable because no other depreciation was claimed			6
			<hr/>
Total			\$13,9
			<hr/>
			<hr/>

- [5] The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5 (c) above, as follows:

1918	12/37	\$4,523.49
1919	24/37	9,046.98
1920	1/37	376.95
Total as above		<hr/> \$13,947.42 <hr/>

6. The taxpayer, in support of his appeal relies upon the following propositions of law:
- (a) That in computing net income there shall be allowed as deductions:
 - (4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business. Section 214 (a) Revenue Act of 1918.
 - (b) That in computing net income there shall be allowed as deductions:
 - (8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. Section 214 (a) Revenue Act of 1918.

WHEREFORE the taxpayer respectfully prays that this Board may hear and determine this appeal.

W. M. SMITH,
Counsel for Taxpayer.
Address: 505 Transportation Bldg.,
Washington, D. C.

leased ground, reverted to lessor January 16 1920.....			\$ 7,2
Cooperage, furniture, fixtures etc., book value.....	\$13,965.03		
Less:			
Proceeds of sales originally reported as income in the year 1920....	\$7,801.18		
Estimated value of office furniture retained	100.00	7,901.18	6,0
		<hr/>	<hr/>
Additional depreciation not charged in books. The details of this item are not now available but the amount is reasonable because no other depreciation was claimed			68
		<hr/>	<hr/>
Total			\$13,9
		<hr/>	<hr/>

- [5] The above amount should, it is believed, be apportioned in the same manner as that used by the Commissioner in apportioning the deduction for obsolescence of goodwill as in 5 (c) above, as follows:

1918	12/37	\$4,523.49
1919	24/37	9,046.98
1920	1/37	376.95
Total as above		<hr/> <u>\$13,947.42</u> <hr/>

6. The taxpayer, in support of his appeal relies upon the following propositions of law:

(a) That in computing net income there shall be allowed as deductions:

(4) Losses sustained during the taxable year and not compensated for by insurance or otherwise, if incurred in trade or business. Section 214 (a) Revenue Act of 1918.

(b) That in computing net income there shall be allowed as deductions:

(8) A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence. Section 214 (a) Revenue Act of 1918.

WHEREFORE the taxpayer respectfully prays that this Board may hear and determine this appeal.

W. M. SMITH,
Counsel for Taxpayer.
Address: 505 Transportation Bldg.,
Washington, D. C.

Form NP-2.

[6] TREASURY DEPARTMENT,
Washington.

Office of
Commissioner of Internal Revenue
IT:PA:4-60D.
GWF-406.

July 29, 1925.

Mr. Leon L. Moise,
612 Flood Building,
San Francisco, California.

Sir:

The determination of your income tax liability for the years 1918, 1919 and 1920, as set forth in office letter dated October 22, 1924, disclosed a deficiency in tax amounting to \$5,032.29.

In accordance with the provisions of Section 274 of the Revenue Act of 1924, you are allowed 60 days from the date of mailing of this letter within which to file an appeal to the United States Board of Tax Appeals contesting in whole or in part the correctness of this determination.

Where a taxpayer has been given an opportunity to appeal to the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has appealed and an assessment in accordance with the final decision on such appeal has been made, no claim in abatement in respect of any part of the deficiency will be entertained.

If you acquiesce in this determination and do

not desire to file an appeal, you are requested to sign the inclosed agreement consenting to the assessment of the deficiency and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:PA:4-60D-GWF:406. In the event that you acquiesce in a part of the determination, the agreement should be executed with respect to the items agreed to.

Respectfully,
D. H. BLAIR,
Commissioner,
By C. B. ALLEN,
Acting Deputy Commissioner.

Inclosures:

Statements.

Agreement—Form A.

[7] STATEMENT.

IT:PA:4-60D.

GWF-406.

In re: Mr. Leon L. Moise,
612 Flood Building,
San Francisco, California.

Years.	Deficiency in Tax.
<hr/>	<hr/>
1918 (waiver)	\$ 561.86
1919 (")	4,320.62
1920	149.81
	<hr/>
Total	\$5,032.29

An audit of the 1918 partnership return of Schlesinger and Bender discloses your distributive

interest to be \$20,912.93, instead of \$19,339.76, or a difference of \$1,573.17, which is subject to normal tax at 12%, or \$188.78.

The adjustments made in the partnership income are fully explained in a separate communication to Schlesinger and Bender.

It is noted that \$29,965.08 was reported on Line J, \$85.87 or Line K (b) and \$28,879.21 on Line L, whereas the total of \$29,965.08 and \$85.87 is \$30,050.95 or a difference of \$1,171.74.

The total increase in the income subject to surtax is \$2,744.91 upon which there is due surtax of \$373.08, computed at the rates of 13% on \$1,120.79 and 14% on \$1,624.12.

There is therefore a total deficiency of \$561.86 for the year 1918.

An audit of the 1919 return of Schlesinger and Bender discloses your distributive interest from this partnership to be \$16,523.65 instead of a loss of \$9,717.88. The adjustment of this item increases your net income by \$26,241.53.

The tax liability on your corrected net income of \$33,049.79 is \$4,527.85, and as \$207.23 was assessed there is a deficiency of \$4,320.62 for 1919.

[8] Statement.

Mr. Leon L. Moise.

An audit of the 1920 return of Schlesinger and Bender discloses your distributive interest to be \$13,342.16 instead of \$12,248.96 or a difference of \$1,093.20.

The items of income, reported on your return, were totaled as \$12,348.95 whereas the correct

amount is \$12,427.46. The correction of this error increases your net income by \$78.51.

The total increase in your net income is \$1,171.71 which is subject to normal tax at 8% or \$93.74, and surtax of \$56.07, computed at the rates of 4% on \$251.05 and 5% on \$920.66.

There is, therefore, a total deficiency of \$149.81 for the year 1920.

After consideration of your protest by the Solicitor of Internal Revenue, the Unit is sustained with respect to this deficiency.

The facts contained in your letter of July 8, 1925, have been given due consideration in determining the within deficiency.

[9] State of California,
City and County of San Francisco.

Leon L. Moise, being duly sworn, says that he is the taxpayer mentioned in the foregoing petition; that he has read the said petition, or had the same read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except such facts as are stated to be upon information and belief, and those facts he believes to be true.

LEON L. MOISE.

Sworn before me this 15th day of September, 1925.

[Seal] L. P. LOVELAND,
Notary Public, in and for City and County San
Francisco, State of California.

Now, March 1, 1930, the foregoing Petition certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[10] Filed Oct. 19, 1925, United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7453.

Appeal of LEON L. MOISE, San Francisco, California.

ANSWER.

The Commissioner of Internal Revenue, by his attorney, A. W. Gregg, Solicitor of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

(1) Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

(2) Denies that any error was made in the determination of the deficiency in tax set out in the letter of July 29, 1925.

(3) Admits that in its tax return for the period ending December 31, 1918, the copartnership claimed as a deduction the sum of \$21,848.60 as exhaustion, wear and tear of tangible properties.

(4) Admits the allegations contained in subparagraphs (b) and (c) of paragraph 5.

(5) Admits that the deduction of \$21,848.60 claimed by the taxpayer in its return for the period

ending December 31, 1918 was erroneous; denies that the correct amount is \$13,947.42 and further denies that the taxpayer is entitled to any deduction on account of obsolescence of its tangible property.

(6) Denies, generally and specifically, each and every allegation in the taxpayer's petition contained not hereinbefore admitted, qualified or denied.

[11] PROPOSITION OF LAW.

The taxpayer is not entitled to any deduction on account of its obsolescence of its tangible properties.

WHEREFORE, it is prayed that the taxpayer's appeal be denied.

A. W. GREGG,
Solicitor of Internal Revenue,
Attorney for Commissioner of Internal Revenue.
Of Counsel:

M. N. FISHER,
Special Attorney,
Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing Answer certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[12] Recd. Apr. 7, 1927. United States Board of Tax Appeals.

Filed Apr. 8, 1927.

United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED ANSWER.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits, and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Denies the allegations contained in paragraph 3 of the petition, and alleges that the amount of taxes in controversy are income taxes for the calendar years 1918, 1919, and 1920 and are less than \$10,000.00, to wit, \$5,980.77.

4. (a) Denies that the Commissioner erred in the determination of said taxes as alleged in subdivision (a) of paragraph 4, of the petition; and, alleges that the Commissioner erred by not including

in the petitioner's income for the year 1918, \$5,709.70, for the year 1919, \$11,419.39, and for the year 1920, \$475.60, said amounts being the petitioner's distributive interest in \$52,814.70, deducted for the taxable years 1918, 1919, and 1920, by Schlesinger and Bender as obsolescence of goodwill.

5. (a). Admits that in its tax return for the period ended December 31, 1918, the copartnership claimed as a deduction the sum of \$21,848.60, as exhaustion, wear and tear of tangible properties.

5. (b) Admits the allegations contained in subdivision (b) of paragraph 5, of the petition.

[13] 5. (c) Admits the allegations contained in subdivision (c) of paragraph 5, of the petition, and alleges that the obsolescence of goodwill amounting to \$52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not an allowable deduction of said copartnership.

5. (d) Admits that the deduction of \$21,848.60 claimed by the copartnership in its return for the period ending December 31, 1918, was erroneous. Denies that the correct amount deductible is \$13,947.42, and further denies that the copartnership is entitled to any deduction for obsolescence of its tangible property.

Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied.

A. W. GREGG,

General Counsel,

Attorney for the Commissioner of Internal Revenue.

Of Counsel:

THOMAS. M. MATHER,

Special Attorney,

Bureau of Internal Revenue.

Now, March 1, 1930, the foregoing Amended Answer certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, Board of Tax Appeals.

[14] United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDMENT TO PETITION.

Leave from United States Board of Tax Appeals, first being had and obtained the petitioner in the above-entitled and numbered cause, hereby files *thw* following amendment to the petition now on file herein, and by way of such amendment adds

to and includes in said petition the following allegation:

Petitioner further alleges by way of appeal, that all of the alleged deficiencies and taxes claimed or set forth in the said deficiency letter upon which this appeal is predicated and all alleged deficiencies and taxes claimed or set forth in the Answer and Amendment Answer of the Commissioner of Internal Revenue herein, are forever barred by and under, the provisions of, and periods of limitations contained in, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, the Revenue Act of 1919, the Revenue Act of 1920, the Revenue Act of 1921, the Revenue Act of 1924, and the Revenue Act of 1926, and particularly Section 277 of said last-named Act.

WHEREFORE, the petitioner respectfully prays that this Board may hear and determine his appeal.

JEROME H. BAYER,
Counsel for Petitioner.

State of California,
City and County of San Francisco.

Leon L. Moise, being duly sworn, deposes and says that he is the petitioner above named; that he has read the foregoing amendment, or had the same read to him, and is familiar with the statements contained therein and that the facts stated therein are true except such facts as are stated to be upon information and belief and those facts he believes to be true.

LEON L. MOISE.

Sworn to before me this 3d day of May, 1927.

[Seal]

J. J. KERRIGAN,

Notary Public in and for the City and County of
San Francisco.

Now, March 1, 1930, the foregoing amendment to
petition certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[15] DOCKET Nos. 7453 and 7454.

LEON L. MOISE, GERALD F. SCHLESINGER,
Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER.

It appearing from the record that on May 4, 1927, on motion of petitioner, without objection by respondent, leave was granted petitioner to file amended petitions or amendments to petitions in each of the proceedings, Docket Nos. 7453, 7454, 7454, 7455 and 8036. Thereafter petitioner submitted petitions in Docket Nos. 7455 and 8036 which were duly filed as of May 4, 1927, and has now submitted amended petitions in Docket Nos. 7453 and 7454. It appearing that the amended petitions in the foregoing mentioned proceedings are such amendments as were authorized May 4, 1927, it is

ORDERED that petitioner's amended petition submitted in Docket Nos. 7453 and 7454 be received and filed *nunc pro tunc* as of May 4, 1927.

(Signed) BENJAMIN H. LITTLETON,

Member, U. S. Board of Tax Appeals.

Dated Washington, D. C., June 17, 1929.

A true copy.

[Seal]

Teste: B. D. GAMBLE,

Clerk, U. S. Board Tax Appeals.

Now, March 1, 1930, the foregoing Order certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[16] United States Board of Tax Appeals, Wash-
ington.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER FOR CONSOLIDATION OF AP-
PEALS.

It appearing that the above-entitled appeal has been set down for hearing upon the Circuit Calendar upon Friday, April 29, 1927, and the appeal entitled "Leroy Schlesinger, Petitioner, vs. Commissioner of Internal Revenue, Respondent,"

Docket No. 7455, has been set down for hearing upon the Circuit Calendar upon Tuesday, May 3, 1927, and the appeal entitled "Leroy Schlesinger, Petitioner, vs. Commissioner of Internal Revenue, Respondent," Docket No. 8036, has been set down for hearing upon the Circuit Calendar upon Tuesday, May 3, 1927, and the appeal entitled "Gerald F. Schlesinger, Petitioner, vs. Commissioner of Internal Revenue, Respondent," Docket No. 7454, has been set down for hearing upon the Circuit Calendar upon Tuesday, May 3, 1927, all of said hearings having been scheduled upon said Circuit Calendar to be held at San Francisco, California; and

It appearing that the issues involved in each of said four appeals arises out of the same matter,—

NOW, THEREFORE, upon motion of the taxpayer Leon L. Moise, heretofore made, it is hereby ordered as follows:

That the above-entitled appeal and the other three appeals aforementioned, and the hearings thereof, all be consolidated, and that said four appeals be heard and decided together, and that the hearings of all of said four appeals be held together in one proceeding at the same time and place, to wit, at Room 154 City Hall, San Francisco, California, at 9:30 o'clock A. M. on Tuesday, May 3, 1927, and that they accordingly be placed on the Circuit Calendar for said time and place.

Dated: April 27, 1927.

JOHN J. MARQUETTE.

A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1930, the foregoing Order for Consolidation of Appeals certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[17] A true copy.

Teste: B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET Nos. 7453, 7454, 7455, 8036.

Promulgated September 25, 1928.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

GERALD F. SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

LeROY SCHLESINGER,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Written consents filed with the Commissioner but approved by the Commissioner subsequent to the expiration of the statutory period of limitation are effectual in preventing a bar to the assessment and/or collection of taxes. Joy Floral Company, 7 B. T. A. 800, followed.

The evidence is insufficient to warrant deduction for obsolescence of tangible property.

The Commissioner erred in allowing a deduction for obsolescence of goodwill and his affirmative allegations to that effect in amended answers to the petitions constitute a claim for an increased deficiency under section 274 (e) of the Revenue Act of 1926.

JEROME H. BAYER, Esq., for the Petitioner.

T. M. MATHER, Esq., for the Respondent.

The Commissioner determined deficiencies in income tax as follows:

	Docket No.	1918	1919	1920
Leon L. Moise...	7453	\$561.86	\$4,320.62	\$149.81
Gerald F. Schles-				
inger	7454	409.02	4,248.94	—
LeRoy Schles-				
inger	7455	—	—	153.08
LeRoy Schles-				
inger	8036	414.99	—	—

The proceedings were consolidated for hearing and decision.

The issues involved, identical in all proceedings, are:

(1) Whether or not the assessment and collection of the deficiencies herein alleged are barred by the statute of limitations.

[18] (2) Whether or not in determining the net income of the partnership of which the petitioners were members and consequently would be taxable on its distributive shares, obsolescence on leasehold improvements and equipment is an allowable deduction from gross income.

(3) Whether or not the Commissioner has made a valid assertion of a claim for an increase in the deficiencies under section 274(e).

(4) Whether or not in determining the net income of the partnership of which the petitioners were members obsolescence of goodwill is an allowable deduction from gross income. The Commissioner originally allowed deduction for obsolescence of goodwill, but now claims he erred in so doing.

FINDINGS OF FACT.

Leon L. Moise, Gerald F. Schlesinger and LeRoy Schlesinger were equal partners in the firm of Schlesinger and Bender of San Francisco, California, which was engaged in the wholesale liquor business from the time of its formation, July 1, 1918, until January 16, 1920, the date of its dissolution and termination of business. For many years prior to the formation of the partnership, the liquor business of the three individuals had been conducted in

the same location as a corporation. The premises and plant occupied by the partnership in the conduct of its wholesale liquor business were acquired under the terms of a lease entered into in 1910 between H. Levi & Co., a California corporation, lessor, and Schlesinger and Bender, Inc., a California corporation, lessee. The principal terms of the lease provided for the use of certain land and buildings thereon by the lessee or its assigns at a fixed monthly rental for the period of 15 years. The lease also provided that all additions such as improvements and fixtures should be made at the lessee's expense and at the cancellation or termination of the lease should revert to the lessor. The lease further provided that no business other than that of the lessee should be conducted on the premises.

[19] Believing that it would be compelled to terminate its business in 1920 by reason of national prohibition legislation, and believing that its leasehold improvements and equipment would be wholly obsolete at that time, the partnership charged off its books as a loss on December 31, 1918, the amounts of \$7,200, the balance remaining in its "Building" account, and \$13,965.03, the balance remaining in its "Furniture and Fixtures" account.

Upon closing its affairs early in 1920 the partnership sold its furniture and equipment, but no entries of such sales were made on its books. The lease by virtue of which the partnership occupied its business property was terminated about April 1, 1930, and shortly thereafter the premises were vacated.

The partnership filed returns for the period July 1, 1918, to December 31, 1918, and for the years 1919 and 1920.

In its return for the six months' period July 1, 1918, to December 31, 1918, the partnership claimed as a deduction from gross income the sum of \$21,-848.60 as exhaustion, wear and tear (including obsolescence) of its tangible properties. The Commissioner disallowed this sum as a deduction and refused to allow any amount as a deduction for the obsolescence of tangible property of the partnership.

In its return for the year 1920, the partnership included in its gross income that year the sum of \$7,801.18 representing the proceeds received from sales of cooerage, scrap, and office furniture.

In its returns filed for the period July 1, 1918, to December 31, 1918, and for the years 1919 and 1920, the partnership claimed certain amounts therein as deductions from gross income for the obsolescence of goodwill. The Commissioner, in a letter dated October 22, 1924, signed by A. Lewis, head of division, and addressed to Schlesinger and Bender and received by it, informed the partnership that the correct amount of \$52,814.70 was allowed the partnership as obsolescence of goodwill for prohibition purposes, and [20] indicated its distribution over the three years 1918, 1919 and 1920.

Each of the petitioners involved in these proceedings filed individual income tax returns covering the years in which deficiencies have been asserted.

The return of Leon L. Moise for the year 1918 was filed with the Collector in the First District of

California not later than March 15, 1919. His return for the year 1919 was filed with the Collector in the same district of California not later than March 15, 1920.

An undated income and surtax written consent covering 1918 and expiring March 1, 1925, bearing the purported signatures of Leon L. Moise and D. H. Blair, Commissioner, acknowledged January 4, 1924, was filed with the Commissioner. An income and profits tax consent for 1918 dated February 3, 1925, and expiring December 31, 1925, was executed and filed by the same petitioner. The said petitioner also signed a written consent covering 1919, dated February 3, 1925, and expiring December 31, 1925. Both of the two last-mentioned consents were stamped approved March 25, 1925, and signed by D. H. Blair, Commissioner of Internal Revenue.

The return of Gerald F. Schlesinger for the year 1918 was filed with the Collector at Chicago, Illinois, not later than March 22, 1919. This return bears the stamp "Collector of Internal Revenue, Paid March 15, 1919, Cashier—A, Chicago, Illinois," It also bears the stamp "Collector Int. Rev. March 22, 1919." This return was sworn to under date of March 20, 1919. The return for the year 1919 was filed with the Collector in the First District of California, March 15, 1920.

An income and surtax waiver dated February 25, 1924, covering 1918 and expiring March 1, 1925, and bearing the purported signatures of Gerald F. Schlesinger and D. H. Blair, Commissioner, was filed with the Commissioner. An income and profits

tax waiver for 1918, dated February 3, 1925, and expiring December 31, 1925, was signed by Gerald F. Schlesinger and filed on [21] the said date. He likewise signed an income and profits tax waiver covering 1919 dated January 30, 1925, and expiring December 31, 1925. Both of the two last-mentioned waivers were stamped approved March 25, 1925, and signed by D. H. Blair, Commissioner of Internal Revenue.

The return of LeRoy Schlesinger for the year 1918 was filed with the Collector in the First District of California not later than March 15, 1919.

The petitioner, LeRoy Schlesinger, executed an undated income and surtax waiver for the year 1918 expiring March 1, 1925. This document was accepted on January 4, 1924, and bears on its reverse side the stamp "Personal Audit #4, September 19, 1924, Received."

On July 29, 1925, the respondent issued 60-day letters to petitioners Moise and Gerald F. Schlesinger, notifying them of his final determination of the deficiencies hereinabove set forth. On September 4, 1925, the respondent notified petitioner LeRoy Schlesinger that his claim for abatement had been rejected.

Petitioners allege in paragraph 5 (c) of their petitions as follows:

The Commissioner in his letter dated October 22, 1924, file IT:PAP4—GWF—406 allowed as a deduction to Schlesinger and Bender obsolescence of good will amounting to \$52,814.70 apportionable between the years 1918, 1919 and 1920 as follows:

1918	12/37	\$17,129.09
1919	24/37	34,258.19
1920	1/37	1,427.42

As above \$52,814.70

Upon motions made and duly granted by the Board, the Commissioner filed amended answers in each of these proceedings, in paragraph 4 (a) of which he denies that he had erred in refusing to allow a deduction from gross income of the partnership of which the petitioners were members for obsolescence of tangible property and affirmatively alleged in Docket 8036, LeRoy Schlesinger, "that the Commissioner erred in not including in the petitioner's income for the year 1918, \$5,709.70 and for the year 1919, [22] \$11,419.39, said amounts being the petitioner's distributive interest in \$52,814.70 deducted for the taxable years 1918 and 1919 by Schlesinger and Bender as obsolescence of goodwill."

In paragraph 5 (c) of his amended answer in this proceeding the Commissioner states as follows:

Admits the allegations contained in subdivision (c) of paragraph 5 of the petition, and alleges that the obsolescence of goodwill amounting to \$52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of paragraph 5 of the petition is not allowable deduction to said co-partnership.

In the amended answer in Docket 7453, Leon L. Moise, the Commissioner denied that he had erred as alleged in paragraph 4 (a) of the petition and

“alleged that the Commissioner erred by not including in the petitioner’s income for the year 1918, \$5,709.70, for the year 1919, \$11,419.39, and for the year 1920, \$475.80, said amounts being the petitioner’s distributive interest in \$52,814.70, deducted for the taxable years 1918, 1919 and 1920, by Schlesinger and Bender as obsolescence of goodwill.” And, in paragraph 5 (c) of his amended answer in this proceeding, stated as set forth above by the amended answer in Docket 8036, LeRoy Schlesinger. The Commissioner alleged and admitted as set forth above in the proceeding of this taxpayer in Docket 7455.

The amended answer in proceeding of Gerald F. Schlesinger, Docket No. 7454, contained the same admissions and allegations as first above set forth in the proceeding of LeRoy Schlesinger, Docket 7455.

These amended answers, after specifically admitting and denying every allegation of the petition, conclude as follows:

“Denies generally and specifically each and every other allegation contained in the petition of the above-named taxpayer not hereinbefore expressly admitted, qualified or denied. WHEREFORE, it is prays that the appeal be denied.”

At the hearing of these proceedings counsel for the Commissioner contended for an increase of deficiencies upon the affirmative allegations in the amended [23] answers in respect of the deduction of obsolescence for goodwill.

OPINION.

LITTLETON.—The first contention of the petitioners is that the various written consents filed are ineffective for the reason that they were approved by the Commissioner after the expiration of the five-year period within which the Commissioner could make assessments for the respective years involved.

The Board has previously held that a consent executed after the five-year period has expired is valid and that taxes may be assessed within the period of such consent. *Joy Floral Co.*, 7 B. T. A. 800. Upon the authority of that decision, the contentions of all petitioners with respect to the issue of the statute of limitations are denied. See also *Friend M. Aiken*, 10 B. T. A. 553, and *Sugar Run Coal Mining Co.*, 11 B. T. A. 587.

At the hearing the petitioners Leon L. Moise and Gerald F. Schlesinger contended that the original written consents covering 1918 and expiring March 1, 1925, were neither signed nor authorized by them. However, the said petitioners admitted having filed consents for 1918, dated February 3, 1925, and January 30, 1925, respectively, and expiring December 31, 1925. Whatever may have been the fact as to the original consents, there is no question as to the validity of the later ones. These properly signed consents effectively extended the period fixed by law.

The second issue presented for decision is whether or not in determining the net income of the partnership of which the petitioners were members, obso-

lescence of its tangible assets is allowable as a deduction from gross income.

The first difficulty in granting the petitioners' contention on this point lies in the insufficiency of evidence as to the value of the tangible assets on account of which obsolescence is claimed. The principal evidence presented as to these values was the ledger of the partnership, which showed [24] a balance in the "Building" account at December 31, 1918, of \$7,200 and in the "Furniture & Fixtures" account a balance of \$13,965.03. One of the petitioners testified that the \$7,200 in the "Building" account represented money which had been expended "in building vats and fixtures and also building a cellar in the building which we had leased," but from an examination of the ledger account it appears that this statement does not mean more than that costs of the character referred to were entered in this account and that after adjustments for depreciation, and possibly for other reasons, the balance of \$7,200 remained.

In neither instance do we know how such book values were computed. We have no proof of costs or appropriate rates of depreciation, nor do we have a segregation or identification of the assets upon which the obsolescence was predicated. Neither have we the amount sold or salvaged from the furniture and equipment in 1920. Thus, we have no basis on which to determine the amount of obsolescence in either instance. In the absence of evidence the petitioner's contention under this issue must be denied. *Star Brewing Co.*, 7 B. T. A. 377.

The third issue is whether the Commissioner

erred in allowing the partnership of Schlesinger and Bender a deduction for obsolescence of goodwill and whether by the affirmative allegations in his amended answers he has effectively asserted a claim for increased deficiencies.

Section 274 (e) provides:

The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, if claim therefor is asserted by the Commissioner at or before the hearing or a rehearing.

Rule 14 of the Board's Rules of Practice provides in part that "the answer shall be so drawn as fully and completely to advise the petitioner and the [25] Board of the nature of the defense. It shall contain a specific admission or denial of each material allegation of fact contained in the petition and shall set forth any new matters upon which the Commissioner relies for defense or affirmative relief."

We are of opinion that the Commissioner has, by his amended answers, effectively asserted a claim for increased deficiencies within the meaning of section 274 (e) of the Revenue Act of 1926. The petitioners allege that the Commissioner allowed the partnership a deduction totalling \$52,814.70 for obsolescence of goodwill. The Commissioner admits that he did this and affirmatively alleges that

he erred in so doing and that he erred in not including in the income of each of the petitioners his distributive share of the profits of the partnership without any allowance for obsolescence of goodwill since obsolescence of goodwill is not an allowable deduction from gross income.

It is clear from those allegations that the Commissioner is asserting a claim in each proceeding for a deficiency in excess of the amount originally determined by him. It is not necessary that the claim by the Commissioner for a deficiency in excess of the amount originally determined by him, or for a penalty, additional amount or addition in tax be asserted in any particular language. A sufficient claim has been made if the Commissioner affirmatively alleges error in his original determination together with facts sufficient, if proved, to result in an increase of the net income and the tax of the petitioner over that originally determined by him.

There is no dispute as to the facts relative to the deductions originally allowed by the Commissioner for obsolescence of goodwill. The claim of the Commissioner that he erroneously allowed the partnership deductions for obsolescence of goodwill for the years involved and that the distributive share of the petitioners of the net income of the partnership should be [26] increased accordingly is well taken. *Red Wing Malting Co.*, 8 Fed. (2d) 108; 15 Fed. (2d) 626; *Manhattan Brewing Co.*, 6 B. T. A. 952.

Reviewed by the Board.

Judgment will be entered under Rule 50.

VAN FOSSAN, Dissenting.—I am unable to agree with the prevailing opinion on the third issue of the case. This issue involved the determination of whether or not the Commissioner has effectively asserted the claim for the additional amount or addition to the tax beyond that set forth in the original notices of deficiencies.

Section 274(e) provides:

The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, notice of which has been mailed to the taxpayer, and to determine whether any penalty, additional amount or addition to the tax should be assessed, *if claim therefor is asserted* by the Commissioner at or before the hearing or a rehearing. (Italics ours.)

As I read this section, the assertion of a claim for the additional amount or addition to the tax is a prerequisite to the finding by the Board of such additional amount. There are sound considerations of justice and fairness back of such a provision. Petitioner, upon receipt of a notice of a specific deficiency, prepares his petition in reliance on the representations as to the Government's contentions set forth in the notice. His petition is specifically addressed to those contentions and his preparations to contest the deficiency are confined thereto. Section 274(f) specifically forbids, in cases subsequently arising, the determination of an additional defi-

ciency except in case of fraud or as provided in section 274(e), *supra*, or in case of a jeopardy assessment under section 279(c). By this prohibition Congress has indicated its disposition to protect the taxpayer from repeated deficiency notices covering the same year [27] or from uncertainty in the issues which he is called on to meet. If the Government proposes a greater deficiency under section 274(e), I believe the taxpayer is entitled to demand that the statute be strictly complied with and that it be construed strictly against the Government. He should not be left to infer the asserting of a claim from the general tenor of affirmative allegations of the amended answer.

In the proceedings under consideration the Commissioner has not asked directly for affirmative relief from his alleged error. He made no motion to increase the deficiency appealed from. Upon permission to amend the answers he incorporated affirmative allegations that he had erroneously allowed obsolescence. The prayer of his answer is that the proceedings be dismissed. He now asks us to hold that this allegation of error on his part constitutes the assertion of a claim for additional tax under the statute. With this I cannot agree. In such a situation the taxpayer is entitled to shield himself behind every defense the law affords. The law has provided that a claim shall be asserted for the additional amount of tax. Considering the purpose and language of the statute this provision would seem to require an affirmative act of assertion. Nothing so vital to the rights of a taxpayer

as the finding of a greater deficiency should be left to implication. The proper assertion of a claim is not a difficult task if directly essayed. A motion could have been made at any time during the hearing. On [28] the other hand, to infer or imply the assertion of a claim in the instant cases will open the door to loose pleadings and place on the Board in other cases the burden of interpreting the mind of the Commissioner. The statute provides a simple procedure, and having failed to avail himself thereof, the Commissioner has no basis for complaint.

In my opinion respondent has not effectively or properly asserted a claim for the additional amount or addition to the tax as required by law:

LANSDON agrees with this dissent.

Now, March 1, 1930, the foregoing findings of fact and opinion certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[29] United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER OF REDETERMINATION.

Pursuant to the Board's findings of fact and opinion promulgated September 25, 1928, it is

ORDERED AND DECIDED that there are deficiencies in tax in respect of the above-entitled petitioner of \$2,146.41, \$7,275.23, and \$211.66 for the years 1918, 1919 and 1920, respectively.

(Signed) B. H. LITTLETON,

Member, U. S. Board of Tax Appeals.

Dated Washington, D. C.

Entered Dec. 15, 1928.

A true copy.

Teste: B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

Now, March 1, 1930, the foregoing Order of Redetermination certified from the record as a true copy.

[Seal]

B. D. GAMBLE,

Clerk, U. S. Board of Tax Appeals.

[30] Filed June 11, 1929.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

LEON L. MOISE,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent and Appellee.

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF TAX
APPEALS.

To the Honorable, the Judges of the United States
Circuit Court of Appeals for the Ninth Cir-
cuit:

Now comes Leon L. Moise, the above-designated petitioner and appellant (hereinafter called petitioner), and files this petition for the review of the findings of fact and opinion of the United States Board of Tax Appeals in the Appeal before said Board designated therein as Docket 7453, promulgated on the 25th day of September, 1928, and the decision and order of redetermination of said Board rendered and entered in said appeal on the 15th day of December, 1928, approving, redetermining and fixing deficiencies in income tax of the petitioner for the calendar years 1918, 1919 and 1920 in the amounts of \$2,146.41, \$7,275.23 and \$211.66 respectively, and your petitioner respectfully shows:

[31] I.

STATEMENT OF THE NATURE OF THE
CONTROVERSY.

The respondent and appellee (hereinafter called respondent) is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States of America.

The said petitioner and appellant (hereinafter called petitioner) made his return of income taxes with respect to his income for the years 1918, 1919

and 1920 to the Collector of Internal Revenue at San Francisco, California, nor later than March 15th, 1919, 1920 and 1921 respectively.

Respondent notified petitioner by means of a sixty-day letter dated July 29, 1925, that a deficiency was disclosed in his tax return for the years 1918, 1919 and 1920, totaling \$5,032,29. This deficiency arose primarily out of the disallowance of a deduction for obsolescence of tangible assets of the partnership of Schlesinger & Bender, of which petitioner was a member. This firm was engaged in the wholesale liquor business, with its principal place of business at San Francisco, California. The premises which it occupied were leased premises. The partnership was obliged to, and did terminate its business in January, 1920, by reason of prohibition legislation, which resulted in the obsolescence both of the tangible assets and goodwill of the partnership. A deduction for obsolescence of goodwill was allowed to said partnership by the Commissioner of Internal Revenue. A deduction for obsolescence of tangible assets was made upon the return [32] filed by the partnership for the year 1918. This deduction was disallowed by the Commissioner as set forth in said sixty-day letter dated July 29, 1925, from which letter petitioner took an appeal within the time and in the manner provided by law to the United States Board of Tax Appeals. This appeal was designated in the files of said Board as Docket No. 7453. The said appeal was decided by said Board adversely to said petitioner. It is the proceedings, findings of fact, opinion, deci-

sion and order of redetermination of said Board in that appeal which petitioner now seeks to have reviewed and reversed by this Honorable Court. The questions considered or ruled upon by said United States Board of Tax Appeals in said appeal, as well as the questions arising out of the actions, rulings, findings of fact, opinion, decision, and order or redetermination of said Board therein, are substantially as follows:

Whether or not a form of written consent or waiver executed by a taxpayer, is effective to extend the statutory period of limitation for the assessment and/or collection of taxes, without or before, the approval thereof by the Commissioner of Internal Revenue.

Whether or not a form of written consent or waiver executed and/or filed by a taxpayer after the expiration of the statutory period of limitation for the assessment and/or collection of taxes, is valid and effective.

Whether or not a written consent or waiver filed with the Commissioner within the statutory period of limitations, but not approved by the Commissioner until after the expiration of said statutory period, is effective.

Whether or not the Commissioner of Internal Revenue had the right to file an amended answer in said appeal, without prior notice to said petitioner [33] and without prior opportunity of said petitioner to be heard with respect thereto.

Whether or not the Commissioner had the

right to insert in his amended answer in said appeal new matter and matter not mentioned or referred to or incorporated in his sixty-day letter to petitioner, from which letter said appeal was taken.

Whether or not said United States Board of Tax Appeals had jurisdiction to determine alleged deficiencies additional to or greater or other than the alleged deficiency set forth in the sixty-day letter of the Commissioner to petitioner, and in nowise made a part of petitioner's said appeal, and being wholly different in nature and in the facts out of which they arise from that set forth in said sixty-day letter.

Whether or not entries in books of account of said partnership and the oral testimony of competent witnesses introduced at the hearing of said appeal by the petitioner, were sufficient, as a matter of law, to establish the value and rates of depreciation of tangible properties of said partnership for the obsolescence of which a deduction was claimed, in the absence of any offer of evidence or proof to the contrary by the Commissioner.

Whether or not the Commissioner validly and effectively asserted at or before the hearing of said appeal a claim for deficiency other or greater than or in addition to alleged deficiency set forth in said sixty-day letter.

Whether or not obsolescence of goodwill occasioned by prohibition legislation constituted an allowable deduction.

Whether or not obsolescence of tangible assets occasioned by prohibition legislation constituted an allowable deduction, and if so, whether or not said partnership was entitled to apportion the loss resulting from said obsolescence over a period beginning with the time when it first learned that it would be obliged to discontinue its business and ending with the time when said business was actually terminated by reason of said prohibition legislation.

Whether or not petitioner was entitled to a continuance of said hearing of said appeal.

The foregoing questions were decided by said United States Board of Tax Appeals adversely to petitioner, and the position [34] of petitioner with respect thereto is covered by the assignments of error hereinafter set forth.

II.

DESIGNATION OF COURT OF REVIEW.

Petitioner is and was at all times herein mentioned an inhabitant of the State of California, residing in the City of San Francisco in said state, and being aggrieved by the said decision, findings of fact, opinion and order of redetermination of said Board, desires that the same be reviewed in accordance with law by the United States Circuit Court of Appeals for the Ninth Circuit.

ASSIGNMENTS OF ERROR.

Petitioner as a basis for review, assigns the following errors which he avers occurred before and

upon the hearing of said cause by the United States Board of Tax Appeals and in the decision, findings of fact and opinion of said Board therein, and in the order of redetermination rendered, given and made in said cause, and upon which errors he relies to reverse said decision and order of redetermination, to wit:

(1) The said Board erred in rendering its decision for Respondent herein.

(2) The said Board erred in determining that there is a deficiency in the taxes of petitioner for the year 1918 in the amount of \$2,146.41, for the year 1919 in the amount of \$7,275.23, and for the year 1920 in the amount of \$211.66, or in any amount or amounts at all or any deficiency at all.

[35] (3) The said Board erred in allowing respondent's amended answer herein to be filed without previous notice being given to the petitioner herein and in granting respondent's motion for the filing of said amended answer without previous notice to petitioner of said motion or a hearing thereof.

(4) The said Board erred in refusing to strike the amended answer of respondent herein upon motion duly made by petitioner at the hearing of said cause and in denying said motion.

(5) The said Board erred in refusing to grant to petitioner and in denying his motion for a continuance of the hearing of said appeal.

(6) The said Board erred in refusing, upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's

amended answer an allegation in Paragraph 4a thereof which reads as follows: "alleges that the Commissioner erred by not including in petitioner's income for the year 1918, \$5,709.70, for the year 1919, \$11,419.39, and for the year 1920, \$475.80, said amounts being the petitioner's distributive interest in \$52,814.70 deducted for the taxable years 1918, 1919 and 1920 by Schlesinger & Bender as obsolescence of goodwill." The Board erred in denying said motion.

(7) The said Board erred in refusing upon motion duly made therefor by petitioner at the hearing of said cause, to strike from respondent's amended answer an allegation in Paragraph 5c which reads as follows: "and alleges that the obsolescence [36] of goodwill amounting to \$52,814.70 deducted by Schlesinger & Bender as alleged in subdivision C of paragraph 5 of the petition is not an allowable deduction of said copartnership." The Board erred in denying said motion.

(8) The said Board erred in holding that the so-called affirmative allegations contained in respondent's amended answer were properly included and might remain therein.

(9) The said Board erred in considering obsolescence of goodwill as an issue in said appeal and in ruling that it was an issue therein and in holding that obsolescence of goodwill was made an issue of and in said appeal by the pleadings therein.

(10) The said Board erred in its failure to find or hold that petitioner was entitled to claim deduction for loss occasioned by obsolescence of

the furniture, equipment and leasehold improvements of the partnership of Schlesinger & Bender, of which he was a member, and to apportion this loss over the period of eighteen and one-half months beginning with 1918 when the partnership first learned that it would be obliged to terminate the business, and ending in 1920 when the business was terminated by reason of prohibition legislation.

(11) The said Board erred in its failure to find that improvements on the leasehold of the partnership of Schlesinger & Bender had a value of \$7,200.00, and that said value was entirely wiped out by complete obsolescence of said improvements upon the termination of the lease.

(12) The said Board erred in its failure to find that [37] the value of tangible assests (exculsive of leasehold improvements) of the partnership of Schlesinger & Bender for which obsolescence was claimed was \$13,965.03, and that as a result of said obsolescence the value was reduced to a junk value of \$7,801.18.

(13) The said Board erred in finding that no entries were made on the books of the partnership of Schlesinger & Bender of the sale in 1920 of its furniture and equipment. Said finding is wholly unsupported by and contrary to the evidence.

(14) The said Board erred in its failure to find that the proceeds received by the partnership of Schlesinger & Bender in 1920 from the sales of cooperage, scrap and office furniture was the sum of \$7,801.18, said cooperage, scrap and office fur-

niture being part of the property for which a deduction for obsolescence was claimed.

(15) The said Board erred in its failure to find that the partnership of Schlesinger & Bender discontinued on or about January 16th, 1920, the use of its leasehold premises.

(16) The said Board erred in its failure to find that deduction for obsolescence of goodwill in the amount of \$52,814.70 was in fact allowed to copartnership of Schlesinger & Bender by the Commissioner of Internal Revenue.

(17) The said Board erred in finding that a motion was duly granted by the Board for the filing of an amended answer in this proceeding. Said finding is wholly unsupported by and contrary to the evidence.

(18) The said Board erred in finding that at the hearing [38] of this cause Commissioner contended for an increase of deficiencies based upon the alleged affirmative allegations in the amended answer with respect to the deduction for obsolescence of goodwill. Said finding is wholly unsupported by and contrary to the evidence.

(19) The said Board erred in holding that any waiver executed by petitioner for the year 1918 was valid and/or effectively extended the time fixed by law within which assessment could be made for that year.

(20) The said Board erred in holding that any waiver executed by petitioner for the year 1919 was valid and/or effectively extended the time fixed

by law within which assessment could be made for that year.

(21) The said Board erred in failing to hold that an undated waiver bearing the purported signature of petitioner covering 1918, but bearing no stamp of approval earlier than October 7th, 1924, was not effective to bar the assessment and/or collection of taxes the statutory period of which assessment and/or collection could be made having expired March 15, 1924.

(22) The said Board erred in failing to hold that a waiver bearing purported signature of petitioner for 1918 dated February 3, 1925, expiring December 31, 1925, and bearing no stamp of approval earlier than March 25, 1925, was invalid and void and did not extend the period fixed by law; the statutory period having expired March 15, 1924.

(23) The said Board erred in failing to hold that a [39] waiver bearing the purported signature of petitioner for the year 1919 dated February 3, 1925, and expiring December 31, 1925 and bearing no stamp of approval earlier than March 25, 1925, was invalid and void and did not extend the period fixed by law, the statutory period having expired March 15, 1925.

(24) The said Board erred in failing to hold that even if the allegations contained in the amended answer filed on April 8, 1927, had constituted a valid assertion of a claim for additional deficiency, that claim for such additional deficiency was nevertheless forever barred by reason of the expiration period thereto of the statutory period of limitations.

(25) The said Board erred in holding that a consent or waiver executed after statutory period of limitations has expired is valid and that taxes may be assessed within the period of such consent or waiver.

(26) The said Board erred in holding that a consent or waiver is valid and that taxes may be assessed within the period of such consent or waiver notwithstanding the fact that such waiver or consent has not been approved by the Commissioner until after the expiration of the statutory period of limitations.

(27) The said Board erred in denying the contention of petitioner with respect to the issue of the statute of limitations.

(28) The said Board erred in holding that the evidence was insufficient as to the value of the tangible assets on account of which obsolescence was claimed.

[40] (29) The said Board erred in holding that there was not sufficient evidence to establish how the book values of the tangible assets for which deduction for obsolescence was claimed were computed, and in holding that the method of computing said book values was necessary to be proved.

(30) The said Board erred in holding that there was no proof of costs or appropriate rates of depreciation of the tangible assets for which deduction for obsolescence was claimed.

(31) The said Board erred in its failure to hold that the amount sold or salvaged from the furni-

ture and equipment of Schlesinger & Bender in 1920 was \$7,801.18.

(32) The said Board erred in finding and holding that it had no basis upon which to determine the amount of obsolescence either of furniture and equipment and/or leasehold improvements, and in denying petitioner's contention upon that issue. Said finding is wholly unsupported by and contrary to the evidence.

(33) The said Board erred in holding that petitioner was not entitled to deduct and could not deduct anything for obsolescence of tangible assets of said partnership of Schlesinger & Bender.

(34) The said Board erred in holding that the Commissioner had erred in allowing the partnership of Schlesinger & Bender a deduction for obsolescence of goodwill.

(35) The said Board erred in holding that the Commissioner did at or before the hearing of said cause effectively or at all assert a claim for an increased deficiency or for a [41] deficiency in excess of the amount originally determined by him.

(36) The said Board erred in holding that by so-called affirmative allegations in his amended answer or otherwise or at all Commissioner had effectively asserted a claim for an increased deficiency within the meaning of section 274E of the Internal Revenue Act of 1926, or otherwise or at all.

(37) The said Board erred in finding and holding that the following statements in the amended answer constituted affirmative allegations, to wit: "that the Commissioner erred in not including in

the petitioner's income for the year 1918, \$5,709.70, and for the year 1919, \$11,419.39, and for the year 1920, \$475.80, said amounts being the petitioner's distributive interest in \$52,814.70 deducted for the taxable years 1918, 1919 and 1920, for obsolescence of goodwill," and "that the obsolescence of goodwill amounting to \$52,814.70 * * * is not an allowable deduction to said copartnership."

(38) The said Board erred in failing to hold that the prayer in said amended answer completely negatived the construction of said amended answer as an assertion of a claim for affirmative relief.

(39) The said Board erred in holding that obsolescence of goodwill is not an allowable deduction from gross income.

(40) The said Board erred in holding that a sufficient claim for additional deficiency or addition in tax is made if the Commissioner affirmatively alleges error in his original determination together with facts sufficient, if proved, to result in an increase of the net income and the tax of the petitioner over that originally determined by him.

[42] (41) The said Board erred in assuming jurisdiction over and in considering and determining as issues matters and items not mentioned in or made subject matter of the Commissioner's letter to petitioner and not otherwise effectively asserted at or before the hearing.

(42) The said Board erred as follows: Said Board failed and refused to allow any deduction for obsolescence of furniture and equipment of the copartnership of Schlesinger & Bender and to allow

a re-apportionment of this deduction over the years 1918, 1919 and 1920; and notwithstanding this fact said Board failed to allow any credit to petitioner for his distributive share of the tax paid for 1920 upon \$7,801.18, reported as a profit by the copartnership of Schlesinger & Bender in the year 1920, and representing the amount received as salvage by said copartnership of said furniture and equipment.

(43) The said Board erred in overruling the objection of counsel for petitioner to the question put to LeRoy Schlesinger and set forth on pages 58 and 59 of the transcript of the proceeding upon said appeal, and reading as follows:

“Q. And did they ever claim a deduction for the obsolescence of goodwill for prohibition purposes in those returns?”

Mr. BAYER.—I should like, at this time, to interpose an objection to all questions, relating to obsolescence of goodwill, and to save time, I ask that that same objection be preserved with respect to all questions with reference thereto.

Mr. VAN FOSSAN, Member.—The objection is overruled.”

[43] 44. The said Board erred in making an order of redetermination and/or decision pursuant to the Board's findings of fact and opinion promulgated September 25, 1928.

(45) The said Board erred in ordering and deciding that there is any deficiency, tax or sums of money due, collectible and/or assessable from or against the above-entitled petitioner for the years 1918, 1919 and 1920.

(46) The said Board erred in that its decision rendered in said appeal is contrary to and against law.

(47) The said Board erred in ordering the entry of judgment under Rule 50 pursuant to the prevailing opinion of the Board rendered in said appeal.

WHEREFORE, the above-mentioned petitioner herein prays that the United States Circuit Court of Appeals for the Ninth Circuit review the action of the said United States Board of Tax Appeals in this cause and reverse said decision and order of redetermination of said Board, and direct and order the making and entry of a decision and order by said Board in favor of the petitioner determining that there is no deficiency or increased deficiency in income taxes due, collectible and/or assessable from the petitioner for the years 1918, 1919 and 1920, and that there is no tax or amount at all due, collectible and/or assessable from or against said petitioner for 1918, 1919 and 1920, and that the Clerk of said Board be directed to transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit certified copies of each and all of the documents necessary and [44] material to the presentation and consideration of the foregoing petition for review and as required by the rules of said court and by law, and for such other and further relief as may to this Court appear proper in the premises.

And your petitioner will ever pray.

LEON L. MOISE,
Petitioner and Appellant.
JEROME H. BAYER,

Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Building,
San Francisco, California.

[45] State of California,
City and County of San Francisco,—ss.

Leon L. Moise, being first duly sworn, on oath deposes and says:

That he is the petitioner and appellant above named; that he has read the foregoing petition; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true; and that the said petition is filed in good faith.

LEON L. MOISE.

Subscribed and sworn to before me this 29th day of May, 1929.

[Seal] LAURA E. HUGHES,
Notary Public, in and for the City and County of
San Francisco, State of California.

[46] United States Board of Tax Appeals.
Filed Jun. 13, 1929.

United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner and Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent and Appellee.

NOTICE.

To Hon C. M. Charest, General Counsel, Bureau of
Internal Revenue, Washington, D. C.

You are hereby notified that the above-named petitioner this 11 day of June, 1929, filed with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision, findings of fact, opinion, and order of redetermination of said Board in the above-entitled matter. A copy of said petition for review and assignments of error as filed is attached hereto.

JEROME H. BAYER,

Attorneys for Petitioner and Appellant,
1225 Crocker First National Bank Bldg.,
San Francisco, California.

I hereby this 8 day of June, 1929, accept personal service of a copy of the petition to review and

assignments of error in the above-entitled matter together with notice of the filing thereof.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue, for
Respondent and Appellee.

Now, March 1, 1930, the foregoing petition for review with proof of service certified from the record as a true copy.

[Seal] B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[47] Lodged 2-12-30.

Filed Feb. 15, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

STATEMENT OF EVIDENCE.

The above-entitled appeal, having been consolidated by order of the Board of Tax Appeals with the appeals of Gerald F. Schlesinger, Docket No. 7454, and LeRoy Schlesinger, Docket Nos. 7455 and 8036, for hearing and decision, came on regularly for hearing before United States Board of [48]

Tax Appeals, Honorable Ernest H. Van Fossan, Member, Presiding, on Wednesday, May 4, 1927, at 11 o'clock A. M. of said day, in room 402, City Hall, in the City and County of San Francisco, State of California. The petitioners were represented by Jerome H. Bayer, Esq. The Commissioner of Internal Revenue was represented by T. M. Mather, Esq. The respective parties answered "Ready," and thereupon proceedings were commenced. On behalf of the petitioners, Jerome H. Bayer, Esq., as their counsel, made an opening statement. There then followed a discussion between respective counsel and Mr. Van Fossan, Member, after which, Jerome H. Bayer, Esq., on behalf of petitioners, made a motion to have stricken from the amended answer on file in the appeal of Leon L. Moise, Docket No. 7453, certain allegations, to wit: an allegation in Paragraph 4(a) which reads as follows:

"that the Commissioner erred by not including in the petitioner's income for the year 1918, \$5,709.70, for the year 1919, \$11,419.39, and for the year 1920, \$475.80, said amounts being the petitioner's distributive interest in \$52,814.70, deducted for the taxable years 1918, 1919, and 1920, by Schlesinger and Bender an obsolescence of goodwill";

and an allegation in Paragraph 5(c) which reads as follows:

"that the obsolescence of goodwill amounting to \$52,814.70 deducted by Schlesinger and Bender as alleged in subdivision (c) of para-

graph 5 of the petition is not an allowable deduction to said co-partnership'';

and a motion to have stricken from the amended answer on file [49] in each of the other of said appeals corresponding allegations therein contained.

The grounds of these motions to strike out said allegations from the amended answers were stated at the hearing by Jerome H. Bayer, Esq., counsel for petitioners, substantially as follows: That these amended answers were served upon petitioners only about two or three weeks prior to the hearing, notwithstanding the fact that these appeals were filed nearly two years previously, and that these amended answers attempt to reopen certain questions which all had deemed entirely settled; that no notice of the motions for leave to file these amended answers was given to the taxpayers until after the motions had been granted; that said motions were granted without any notice to the petitioners of the time or place of the hearing thereof, whereas taxpayers were entitled to fifteen (15) days' notice under the regulations of the Board (Rep. Tr., pp. 7, 8, 10 and 20); that the contents of said allegations of said amended answers are not proper issues in these appeals, since the deficiency letters which are the bases of these appeals and the petitions of appeal in nowise refer to any controversy or issue with respect to deductions made for obsolescence of goodwill; that at a late day, counsel for the Commissioner of Internal Revenue seeks to inject into these appeals matters which were in nowise contemplated in the pleadings or papers [50] upon which the appeals are based;

that under Subdivision (f) of Sec. 274 of the Revenue Act of 1926, the Commissioner has no right to determine a deficiency in addition to that specified in the deficiency letter; that said subdivision must be applied to these appeals; that the issue in these appeals must be confined to the issue as determined by the deficiency letters upon which the taxpayers fairly relied when they filed their appeals; that Subdivision (e) of Sec. 274 of the Revenue Act of 1926 provides that the Board shall have jurisdiction to redetermine the correct amount of deficiency, even if in excess of the amount mentioned in notice to taxpayer, if claim therefor is asserted by the Commissioner at or before the hearing; that the allegations in the amended answers to which motions to strike are directed merely allege defensively that the Commissioner erred in allowing deduction for obsolescence of goodwill and the prayers of the amended answers merely ask that the appeals be denied; that there are in the amended answers no claims asserted for additional deficiency but merely allegations by way of affirmative defense and followed by prayers asking that the appeals be denied; nor is Commissioner here asserting any claim for additional deficiency. (Rep. Tr., pp. 7, 8, 9, 10, 11, 12, 14, 15.)

Then followed argument by respective counsel upon these motions to strike said allegations from the amended [51] answers, at the conclusion of which, the said motions were denied; Mr. Van Fossan, Member, saying, "I believe that we will proceed with the trial of the case on the issues as joined by the amended answers" (Rep. Tr., p. 23).

Thereupon Jerome H. Bayer, Esq., on behalf of petitioners, made a motion for a continuance of the hearing of said appeals, on the ground that the petitioners were being taken by surprise, and were entitled to further time to prepare themselves, owing to the fact that the Commissioner of Internal Revenue was attempting, through the aforementioned affirmative allegations in the amended answers, at the last minute to inject issues into these appeals, which were not raised in the original answers, and that the petitioners had no notice of the motions for leave to file the amended answers, and were not advised of the filing thereof until shortly before the hearing. (Rep. Tr., pp. 23-24.) T. M. Mather, Esq., on behalf of Commissioner of Internal Revenue, then opposed the motion for continuance substantially on the following grounds: That there was no element of surprise in these cases, and that there is no new question of fact developed by the amended answers but merely a question of law. The motion for continuance was thereupon denied. (Rep. Tr., pp. 23, 24, 28, and 29.)

Thereupon Jerome H. Bayer, Esq., on behalf of petitioners, made a motion for leave to make and file an amendment to the petition of appeal in each of the four [52] appeals to set up the statutes of limitations which appear in the several revenue acts with respect to all of the alleged deficiencies set forth in the deficiency letters and in the affirmative allegations of the amended answers.

The following then transpired:

Mr. BAYER.—“The form of amendment which

we desire to have incorporated into the four appeals will read as follows”: (the form of amendment then read by Mr. Bayer and filed in each of the four appeals is printed *in haec verba* elsewhere in this transcript).

Mr. MATHER.—“I have no objection to such an amendment.”

The said motion was thereupon granted. (Rep. Tr., pp. 29, 30 and 31.)

Thereupon T. M. Mather, Esq., on behalf of Commissioner of Internal Revenue, made an opening statement. At the conclusion of said opening statement T. M. Mather, Esq., on behalf of Commissioner of Internal Revenue, made certain motions which are not material to the present proceeding and are therefore omitted from this statement of evidence.

Thereupon, LeROY SCHLESINGER, produced as a witness on behalf of the petitioner, having been first duly sworn, testified as follows: (Rep. Tr., p. 36 et seq.)

TESTIMONY OF LeROY SCHLESINGER, FOR PETITIONER.

(Direct Examination by Mr. BAYER.)

WITNESS.—I reside in Burlingame, California. I know Leon L. Moise and Gerald Schlesinger. I have been engaged [53] in business with them up to the time we closed the business in January, 1920. The form of business in which I was engaged with them was a corporation up to June 30, 1918; and from

(Testimony of LeRoy Schlesinger.)

July 1, 1918, to January 16, 1920, it was a copartnership. The partnership was dissolved and our business terminated in January, 1920. The nature of the business which I and these other gentlemen maintained was the California wine business, wholesale wine. Our plant was located at 16th and Kansas Streets, San Francisco. Our office was also located there. The position which I occupied in the firm was that of general manager, and as such I had charge of the supervision of the books of accounts of the partnership.

The witness was then interrogated as follows:

Q. "I show you here, Mr. Schlesinger, a certain book of account, purporting to be a ledger of Schlesinger & Bender, the copartnership. Do you recognize that book?" A. "I do."

The WITNESS.—(Continuing.) That is, in fact, the ledger of Schlesinger & Bender. Referring to page 97 of that book, under the heading of "Building," I find there is an item of loss entered there, on December 31, 1918, profit and loss, \$7,200. That entry was made under my supervision and upon my instructions. On the same page, page 97, under the heading of furniture and fixtures, I find a loss entered for furniture and fixtures, on December 31, 1918, for \$13,965.03. Both of these entries were made pursuant to my instructions [54] by the bookkeeper of the partnership. The circumstances surrounding the making of those entries are as follows: The \$7,200 was what we called "a building account." It was customary for us yearly to deduct 10%, but on December 31, 1918, knowing

(Testimony of LeRoy Schlesinger.)

that we would be compelled to retire from business in 1920, we figured that this entire \$7,200 remaining on the building account, which was money that we had advanced in building vats and fixtures, and also building a cellar in the building which we had leased, would be a total loss, and therefore, we deemed it advisable to charge this entire account off in 1918. The item under "building" to which I have referred, covers the office that we built in this building on which we had a lease.

Thereupon the following transpired at the hearing:

Mr. BAYER.—"I offer in evidence this ledger and ask that the page 97 referred to be copied out and then the ledger be withdrawn. Is that agreeable to counsel?"

Mr. VAN FOSSAN, Member.—"Subject to examination by counsel for the respondent and the introduction on his part of such other evidence as he may find pertinent, the request will be granted. It will be marked Petitioner's Exhibit No. 1, and leave granted to substitute a copy for the page that may be pertinent."

Thereupon there was introduced in evidence Petitioner's Exhibit No. 1, page 97 of which is substantially in words and figures as follows:

PETITIONER'S EXHIBIT No. 1.

[55] BUILDING.

1916.

Jan. 1. Balance 11,744.35

1917.

Dec. 31. 10% Depreciation 1,174.43

Dec. 31. Depreciation 2,569.92

Dec. 31. Balance 8,000.00

11,744.35

11,744.35

1918.

Jan. 1. Balance 8,000.00

June 30. Depreciation 8,000.00

Dec. 31. P. & L. 7,200.00

FURNITURE AND FIXTURES.

1916.			
Jan. 1.	Balance	17,954.50	July 25. R. R. C.....
Oct. 5.	Ft. on Filter	28.20	Dec. 31. 10%
16.	“	350.00	1,820.02
1917.			
Jan. 25.	Desk	39.90	Dec. 31. Depreciation
Mar. 3.	Typw.	98.75	Dec. 31. Balance
July 18.	10% adv. on Ford car ...	40.00	15,000.00
July 24.	Bal. Ford car.....	401.75	
Sept. 4.	Typewriter	92.25	
“ 20.	Boiler	220.00	
4.	Boiler	250.00	
		19,485.35	
			19,485.35

1918.

Jan. 1.	Balance	15,000.00	June 30.	Depreciation	1,551.67
Feb. 20.	Three files	97.70	Dec. 31.	P. & L.	13,965.03
Mar. 19.	Posting deck	90.00			
Apr. 3.	Van Emon Elevator Co. . .	275.00			
May 7.	Van Emon Elevator Co. . .	54.00			
		<u>15,516.70</u>			<u>15,516.70</u>

(Testimony of LeRoy Schlesinger.)

[56] Mr. BAYER.—Q. “Mr. Schlesinger, I show you here a certain document, and ask you whether you recognize it?”

A. “I do.”

The WITNESS.—That document is a photostatic copy of the original lease covering the premises which we occupied in San Francisco. To the best of my knowledge it is a true and exact copy of the lease which was executed by and between Schlesinger and Bender and H. Levy & Company on the 31st day of December, 1910.

Mr. BAYER.—“I offer that in evidence.”

The WITNESS.—(Continuing.) I couldn't tell you the exact date when this photostat was made. It was made under my direction, I believe that it was made in Washington from the original lease. I was not there at that time. It was made at our request. The original lease was sent to the Government and we were never able to find it. And this photostat was made at the request of our accountants. I cannot recollect when we requested this photostat to be made. It is my understanding that the original cannot be located by the Government. As to what they made the photostat from, I had a copy of it, myself; I had made a typewritten copy of the original before I sent the original to the Government. To the best of my knowledge this photostatic copy was made in Washington.

Mr. BAYER.—“We offer this in evidence.”

Mr. MATHER.—“That is objected to as incompetent and not the best evidence.”

(Testimony of LeRoy Schlesinger.)

Mr. VAN FOSSAN, Member.—“It will be admitted as Petitioners’ Exhibit No. 2.”

[57] Thereupon there was introduced in evidence Petitioner’s Exhibit No. 2, the material portions of which are substantially in words and figures as follows:

PETITIONER’S EXHIBIT No. 2.

“THIS INDENTURE, Made at San Francisco, California, this 31st day of December, A. D. 1910, by and between H. LEVI & COMPANY, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, hereinafter called the Lessor, which expression shall include its successors and assigns, and SCHLESINGER & BENDER, INC., a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of California, hereinafter called the Lessee, which expression shall include its successors and assigns,

WITNESSETH:

“That Whereas, the said lessor is the owner of a triangular lot of land situated in the City and County of San Francisco, State of California, and briefly described as follows, to-wit:

“Beginning at the point where the Northerly line of Sixteenth Street intersects the Easterly line of Kansas Street; thence running Easterly along the Northerly line of Sixteenth Street One hundred and eighty-one and forty-six one hundredths (181.46) feet; thence at an angle Northwesterly Three hun-

dred and fifty-six and twenty-two one hundredths (356.22) feet to a point in the Easterly line of Kansas Street which is distant thereon Ninety-three and forty-six one hundredths (93.46) feet southerly from the Southerly line of Fifteenth Street; thence running Southerly along said Easterly line of Kansas Street three hundred and six and fifty-four one hundredths (306.54) feet to the point of beginning. Containing 27,812 square feet of superficial area.

“And in consideration of the agreement of the lessee herein expressed said lessor is willing to construct thereon a two-story Class C brick warehouse building with division firewall as required by the Municipal Ordinance, the same to cover about 20,000 square feet of said area of said lot, and,

“Whereas, said lessee desires to lease said lot and building for the purpose of conducting therein and thereon its business as a wine merchant,

“Now Therefore, said lessor does by these presents lease and demise unto the said lessee the aforesaid real property, together with said building when the same shall be constructed thereon;

[58] “To have and to hold the same and said premises hereby demised for the term of Fifteen (15) years from the date said building shall be completed and ready for occupation and possession thereof is offered to said lessee, yielding and paying therefor unto said lessor a monthly rental which shall be ascertained at the time of completion of said building in the manner hereinbelow provided, and shall be payable monthly in advance in gold coin of the United States of America of present standard

value, at the office of said lessor or at such other place in San Francisco as it may appoint.

* * * * *

“Said building shall be provided with one suitable freight elevator, and the rough plumbing and electric wiring shall be put in by the lessor at its expense, but all interior subdivisions, office conveniences and accessories and all fixtures for light, water and power shall be put in by the lessee at its own expense. The lessee may also at any time build upon the unoccupied portion of said lot at its own expense, provided, however, that the plans and specifications of the building to be erected shall first be submitted to and approved by the lessor and that the lessee shall for the remainder of said term pay any increased in the rates of insurance on said building constructed by the lessor which may be caused by or due to the erection of said new building or structure by the lessee.

* * * * *

“That the lessee will not make nor suffer to be made any alterations of or addition to said premises without the consent in writing of the lessor, its successors or assigns, first had and obtained, except as hereinabove provided, and that all additions to or improvements of the said premises and all new buildings or structures constructed or placed upon said lot by the lessee or by its authority shall belong to the lessor, its successors or assigns.

* * * * *

“The lessee shall during the term of this lease keep said premises free from nuisance and offense

(Testimony of LeRoy Schlesinger.)

to health and safety and that it will in all respects in all its dealings with said property comply with all laws and ordinances relating thereto and with the requirements of the police, fire department, board of supervisors, and board of public works, of the City and County of San Francisco, in reference thereto, at its own expense, and will not conduct nor permit to be conducted thereon any other business than its own business as aforesaid, nor any transaction that will damage the building or cause an increase of the rates of insurance.

* * * * *

[59] “IN WITNESS WHEREOF, the Lessor and Lessee have hereunto caused their corporate names to be subscribed and their corporate seals to be affixed by their proper officers thereunto duly authorized by Resolution of their respective boards of directors, the day and year first above written.

“H. LEVI & COMPANY, (Lessor).

“By H. LEVI, President.

“By R. C. FEIGE, Secretary.

“SCHLESINGER & BENDER INC.

“By LEON L. MOISE, President.

“By L. SCHLESINGER, Secretary.”

The WITNESS.—(Continuing.) Subsequent to 1918, we entered into negotiations with Levy & Sons, the owners of these leased premises, to terminate the lease; I wrote them a letter. I am shown what purports to be a copy of a letter sent to H. Levy & Co., and signed Schlesinger & Bender, per L. S. I identify that document. It is a letter that I wrote,

(Testimony of LeRoy Schlesinger.)

notifying them that we were going to cancel the lease, and after they received the letter, they came down. I delivered the lease to them and the lease was terminated. To the best of my recollection, the premises were vacated about the 15th of April, or the 1st of May, or thereabouts. But the premises were not used for our business after January 16, 1920.

Mr. BAYER.—We offer this in evidence.

Mr. VAN FOSSAN, Member.—It will be received as Petitioner's Exhibit No. 3.

Thereupon there was introduced in evidence Petitioner's Exhibit No. 3, which is substantially in words and figures as follows:

[60] PETITIONER'S EXHIBIT No. 3.

SCHLESINGER & BENDER, Inc.

San Francisco, Cal. 3/22/1920.

H. Levi & Co.,
City.

Dear Sirs:

We refer you to portions of the lease which read as follows: Whereas: said lessee desires to lease said lot and building for the purpose of conducting therein and thereon its business as a wine merchant.

Paragraph 6: And will not conduct nor permit to be conducted thereon any other business than its own business as aforesaid nor any transaction that will damage the building or cause an increase of the rates of insurance.

(Testimony of LeRoy Schlesinger.)

Being that the government has so legislated that we can no longer conduct our own business which was a wine business, we hereby beg to notify you that we will vacate these premises on March 30th 1920.

Respectfully yours,
SCHLESINGER & BENDER,
per: L. S.”

The WITNESS.—(Continuing.) I have received a form of assessment for taxes covering the year 1918. The date of that assessment was February 27, 1925.

The witness was thereupon cross-examined by T. M. MATHER, Esq., and upon such cross-examination testified as follows:

The WITNESS.—“My name is Leroy Schlesinger.”

Mr. BAYER.—“May I ask one more question: Mr. Schlesinger, when you retired from business in 1920, was any sale made of the furniture and equipment of your business?”

A. “There was.”

The WITNESS.—(Continuing.) The entry of what it was sold for was only made in a small little pass-book covering the amount that we received and was rebated in our income tax [61] of 1920. A tax was paid, not as our income tax. The report in 1920 will show.

The following then transpired at the hearing:

Mr. MATHER.—(Showing the witness a docu-

(Testimony of LeRoy Schlesinger.)

ment.) Q. "Mr. Schlesinger, is that your signature?"

A. "That is my signature."

Q. (Showing the witness another document:) "Is that your signature?"

A. "Yes, that is my signature."

Mr. VAN FOSSAN, Member.—"Counsel is showing him what?"

Mr. MATHER.—"Income surtax waiver."

Mr. VAN FOSSAN, Member.—"You first showed him the income tax return?"

Mr. MATHER.—"The income tax return for the year 1918."

Mr. MATHER.—"I would like to have that marked for identification as Respondent's Exhibit 'A.'" (Rep. Tr., pp. 46, 47.)

Redirect examination of the witness was thereupon conducted by JEROME H. BAYER, Esq.

Mr. BAYER.—Q. "Mr. Schlesinger, I show you this document, which is headed 'Individual Income Tax Return for the calendar year 1918' and ask you whether that is your signature?"

A. "It is."

Mr. BAYER.—"I offer that in evidence as petitioner's exhibit. I am offering the whole thing."

[62] Mr. VAN FOSSAN, Member.—"It will be received as Petitioner's Exhibit No. 4." (Rep. Tr., pp. 47, 48.)

(NOTE: Petitioner's Exhibit No. 4 is "Individual Income Tax Return for Calendar Year 1918," of Le Roy Schlesinger, and it shows upon its face

(Testimony of Leon L. Moise.)

that it was filed with the Collector of Internal Revenue in the 1st District of California not later than March 15th, 1919.)

Thereupon LEON L. MOISE was produced as a witness on behalf of petitioner, and having been first duly sworn, testified as follows:

TESTIMONY OF LEON L. MOISE, FOR PETITIONER.

(Direct Examination by Mr. BAYER.)

The WITNESS.—I am the Leon L. Moise named in the petition now pending before this court. I reside at 380 First Avenue, San Francisco. That is my signature on the document now shown me entitled “Income and Profits Tax Waiver, dated February 3, 1925.” That is for 1918. I do not recognize as my signature the signature on the document which is shown me entitled “Income and Surtax Waiver.” I never authorized anybody to sign that for me. I do not know who did sign this waiver, which I have stated is not my signature. I do not recognize that handwriting as belonging to anyone within my acquaintance. I never signed any other waivers for the year 1918, save and except the one which I have already identified, dated February 3, 1925.

Mr. BAYER.—“I desire to offer in evidence, on behalf of the petitioners, the income and profits tax waiver, dated [63] February 3, 1925, and the following document which the witness has testified

(Testimony of Leon L. Moise.)

does not bear his signature, but which is entitled 'Income and Surtax Waiver,' in evidence."

Mr. VAN FOSSAN, Member.—They will be received as Petitioner's Exhibits Nos. 5 and 6.

(NOTE: True and exact copies of the documents admitted in evidence as Petitioner's Exhibits Nos. 5 and 6 are attached to this Statement of Evidence at the end thereof, and marked Exhibits No. 1 and No. 2.)

The WITNESS.—(Continuing.) I have heard Le Roy Schlesinger testify as to certain deductions which were made for the year 1918 upon his return for obsolescence of the tangible assets of the business. Similar deductions were made in my return for that year. (Rep. Tr., pp. 48-50.)

Thereupon cross-examination of the witness was conducted by T. M. MATHER, Esq.

The WITNESS testified as follows: The signature on the Income and Surtax Waiver for the year 1918, Petitioner's Exhibit No. 6, is not my signature. To the best of my knowledge I did not authorize anyone to make that waiver for me. It might be possible that I might have authorized somebody to execute that waiver for me, because it is a long time since that happened. I do not think I authorized anybody to sign for me. I never do authorize anybody to sign [64] for me. I authorized no one to sign that waiver for me. To the best of my knowledge these two are the only waivers I ever executed.

(Testimony of Leon L. Moise.)

(The witness was referring to two documents exhibited to him, to wit: "Income and Profits Tax Waiver for 1918," dated February 3, 1925, being Petitioner's Exhibit No. 5, and "Income and Profits Tax Waiver for 1919," dated February 3, 1925, being Respondent's Exhibit "B.")

Q. Is it possible that you may have executed some other waivers?

A. To the best of my knowledge I do not remember that I executed other waivers. It is possible. That is my signature on Income and Profits Tax Waiver, dated February 3, 1925, covering the taxable year 1919. I executed that instrument, on or about the date it bears date.

Mr. MATHER.—I would like to have that marked for identification, Respondent's Exhibit No. "B." (Rep. Tr., pp. 51, 52.)

Thereupon GERALD F. SCHLESINGER was produced as a witness on behalf of the petitioner, and having been first duly sworn, testified as follows:

TESTIMONY OF GERALD F. SCHLESINGER,
FOR PETITIONER.

(Direct Examination by Mr. BAYER.)

The WITNESS.—I am the Gerald F. Schlesinger named in one of these appeals. I have heard the testimony of LeRoy Schlesinger as to certain deductions which he made in his [65] income tax return for the year 1918, relative to obsolescence

(Testimony of Gerald F. Schlesinger.)

of tangible assets. A similar deduction was made in my return for that year. (Rep. Tr., p. 53.)

Thereupon the witness was cross-examined by T. M. MATHER, Esq., and the following transpired:

Q. Did you ever execute any waivers, Mr. Schlesinger? A. I did. (Rep. Tr., p. 53.)

Thereupon GERALD F. SCHLESINGER was recalled by the petitioner, and testified as follows:

TESTIMONY OF GERALD F. SCHLESINGER,
FOR PETITIONER (RECALLED).

(Direct Examination by Mr. BAYER.)

The WITNESS.—The signature on the document here shown to me entitled Income and Profits Tax Waiver, bearing date January 30, 1925, is mine.

Mr. BAYER.—We ask that that document be entered in evidence.

Mr. VAN FOSSAN, Member.—It will be received as Petitioner's Exhibit No. 7.

(NOTE: A true and correct copy of the document received in evidence as Petitioner's Exhibit No. 7 is attached to this Statement of Evidence at the end thereof and marked Exhibit No. 3.)

The WITNESS.—The signature on the document here shown to me entitled "Income and Profits Tax Waiver," bearing date January 30, 1925, is my signature. The signature on [66] the document here shown to me entitled "Income and Surtax Waiver" is not my signature. (The witness was

(Testimony of Gerald F. Schlesinger.)

last referring to a document admitted in evidence as Petitioner's Exhibit No. 9.)

Mr. BAYER.—I offer the last two documents in evidence.

Mr. VAN FOSSAN, Member.—They will be received as Petitioner's Exhibits 8 and 9.

(NOTE: True and correct copies of the two documents admitted in evidence as Petitioners' Exhibits Nos. 8 and 9 are attached to this Statement of Evidence at the end thereof, and marked Exhibits No. 4 and No. 5.)

The witness was thereupon cross-examined by T. M. MATHER, Esq., and testified as follows:

The WITNESS.—I cannot recall that I ever before saw the document, Petitioners' Exhibit No. 9. I am positive that that is not my signature. I do not know J. V. Brown. I never heard of him. (Rep. Tr., pp. 56, 57.)

Thereupon petitioners rested.

Thereupon LeROY SCHLESINGER was recalled by the Commissioner as an adverse witness and testified as follows:

TESTIMONY OF LEROY SCHLESINGER,
FOR PETITIONER (RECALLED).

(Direct Examination by Mr. MATHER.)

The WITNESS.—I was a member of the firm of Schlesinger & Bender. The other partners of that firm were Leon L. Moise [67] and Gerald F. Schlesinger. We had articles of copartnership of

(Testimony of LeRoy Schlesinger.)

that firm. I have not them here in court. They certainly were written articles of copartnership, to the best of my knowledge. The partner's interest in this partnership was one-third each, and the members were Gerald F. Schlesinger, myself and Leon L. Moise. Our partnership executed income tax returns while they were in business. The years for which the partnership executed Income Tax Returns were July 1, 1918, to December 31, 1918, for the whole year of 1919 and 1920.

Mr. MATHER then interrogated the witness as follows: And did they ever claim a deduction for the obsolescence of goodwill for prohibition purposes in those returns?

Mr. BAYER.—I should like, at this time, to interpose an objection to all questions, relating to obsolescence of goodwill, and to save time, I ask that the same objection be preserved with respect to all questions with reference thereto.

Mr. VAN FOSSAN, Member.—The objection is overruled.

A. I believe they did.

The WITNESS.—(Continuing.) I do not recall the amount of the allowance of obsolescence of goodwill for prohibition purposes by the Government. The department allowed the partnership a deduction for the obsolescence of goodwill for prohibition purposes. (Rep. Tr., pp. 57-60.)

[68] Mr. MATHER then stated: At this time the Commissioner wishes to introduce in evidence Respondent's Exhibit "A," which is an Income and

Surtax Waiver for the year 1918, signed by LeRoy Schlesinger, which has been previously identified.

Mr. VAN FOSSAN, Member.—It will be received as Respondent's Exhibit "A." (Rep. Tr., p. 61.)

(NOTE: A true and correct copy of the document admitted in evidence as Respondent's Exhibit "A," is attached to this Statement of Evidence at the end thereof, and marked Exhibit No. 6.)

Mr. MATHER.—And I also wish to offer in evidence the Income and Profits Tax Waiver, dated February 3, 1925, for the year 1919, signed Leon L. Moise, and marked for identification, Respondent's Exhibit "B."

Mr. VAN FOSSAN, Member.—It will be received as Respondent's Exhibit "B."

(NOTE: A true and correct copy of the document admitted in evidence as Respondent's Exhibit "B" is attached to this Statement of Evidence at the end thereof, and marked Exhibit No. 7.)

Mr. BAYER.—I would like to introduce in evidence the tax returns of the petitioners.

Mr. BAYER.—It is understood that such papers as form a part of the return shall be offered along with the return?

[69] Mr. VAN FOSSAN, Member.—Anything that forms a part of the return as made by the petitioner is included within the word "Return."

Mr. BAYER.—We offer, in accordance with your Honor's ruling, the Individual Tax Return of Gerald F. Schlesinger for the year 1919; the Individual Tax Return of Gerald F. Schlesinger for

the year 1918; the Individual Income Tax Return of Leroy Schlesinger for the year 1920. Subject to your Honor's previous ruling, we offer in evidence, in behalf of petitioners, a document entitled "Individual Income Tax Return for Leon L. Moise, for the year 1918," and Individual Income Tax Return for Leon L. Moise, for the year 1919, and an Individual Income Tax Return for the calendar year 1920 for Leon L. Moise.

Mr. VAN FOSSAN, Member.—It will be marked with appropriate numbers. (Rep. Tr., pp. 62-66.)

(NOTE: Petitioner's Exhibit No. 10 is "Individual Income Tax Return for calendar year 1918," of Gerald F. Schlesinger, and it shows upon its face that it was filed with the Collector of Internal Revenue at Chicago, Illinois, not later than March 22, 1919, and bears stamp "Collector of Internal Revenue, paid March 15, 1919, Cashier A., Chicago, Illinois." It also bears stamp of "Collector of Internal Revenue, March 22, 1919," and is sworn to under date of March 20, 1919.)

Petitioner's Exhibit No. 11 is "Individual Income Tax [70] Return for calendar years 1919," of Gerald F. Schlesinger, and it shows upon its face that it was filed with the Collector of Internal Revenue in the First District of California on March 15, 1920.

Petitioner's Exhibit No. 12, is "Individual Income Tax Return for calendar year 1920," of LeRoy Schlesinger. This return discloses under item 15, page one, entitled "Income from Partner-

ships, etc.," that the taxpayer received the sum of \$12,248.96 from the partnership of Schlesinger & Bender for the year 1920 in addition to any sum received as salary from said partnership, and paid tax thereon, and that said return was filed with the Collector of Internal Revenue for the First District of California April 6, 1921.

Petitioner's Exhibit No. 13 is "Individual Income Tax Return for the calendar year 1918," of Leon L. Moise, and shows on its face that it was filed with the Collector of Internal Revenue in the First District of California on March 15, 1919.

Petitioner's Exhibit No. 14 is "Individual Income Tax Return for the calendar year 1919" of Leon L. Moise, and shows on its face that it was filed with the Collector of Internal Revenue for the First District of California on March 15, 1920.

Petitioner's Exhibit No. 15 is "Individual Income Tax Return for calendar year 1920," of Leon L. Moise. This return discloses under item 15, page one, entitled "Income from Partnerships, etc.," that the taxpayers received the sum of \$12,248.96, from the partnership of Schlesinger and Bender for the year 1920 in addition to any sum received as salary from said partnership, [71] and paid a tax thereon, and that said return was filed with the Collector of Internal Revenue for the First District of California on April 7, 1921.

Mr. MATHER.—If your Honor please, it is hereby stipulated and agreed, by and between the parties, through their respective counsel, that a letter from A. Lewis, dated October 22, 1924, addressed

to Schlesinger & Bender, contains the correct amount of \$52,814.70, that was allowed the partnership of Schlesinger & Bender as obsolescence of goodwill for prohibition purposes, and was distributed over the three years, 1918, 1919 and 1920, as shown in said letter.

Mr. BAYER.—It is so stipulated, and pursuant to that stipulation, that that letter be offered in evidence.

Mr. VAN FOSSAN, Member.—It will be received as Petitioner's Exhibit No. 16.

Thereupon both parties rested.

Mr. VAN FOSSAN, Member.—Let the record show that both parties rest. You can have until July 1st, for filing briefs in this case, briefs to be filed simultaneously, no reply briefs.

(Rep. Tr., pp. 66-68.)

[72] The foregoing is the substance of all the evidence given at the hearing of the above cause before United States Board of Tax Appeals which is material to the petition for review by United States Circuit Court of Appeals for the Ninth Circuit, and the assignments of errors contained in said petition for review.

J. S. Y. IVINS,

Associate Counsel for Petitioner.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

[73] The foregoing Statement of Evidence is hereby approved and ordered made of record in and for said petition for review and the proceedings thereon, this 15th day of February, 1930.

By the Board.

(S.) LOGAN MORRIS,
Member.

PETITIONER'S EXHIBIT No. 5.

[74] EXHIBIT No. 1 (Front).

U. S. Board of Tax Appeals. Div. ——. Docket 7453, 54, 55, 8036. Admitted in Evidence May 4, 1927. Petitioner's Exhibit 5.

IT:PA:4

GWF:406

February 3, 1925.

INCOME AND PROFITS TAX WAIVER
(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws Mr. Leon L. Moise, a taxpayer of San Francisco, Cal., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year(s) 1918, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days

between the date of mailing of said notice of deficiency and the date of final decision by said Board.

LEON L. MOISE,
Taxpayer.

.....

Date.

Approved Mar. 25, 1925.

D. H. BLAIR,
Commissioner of Internal Revenue.

O. K.—C. C. W.

3/25/25

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[75] EXHIBIT No. 1 (Back).

[Stamped:]

Received

Feb. 9, 1925.

Personal Audit Division

Personal Audit No. 4

Feb. 9, 1925.

Received

PETITIONER'S EXHIBIT No. 6.

[76] EXHIBIT No. 2 (Front).

U. S. Board of Tax Appeals. Div. ——. Docket
7453, 54, 55, 56. Admitted in Evidence May 4, 1927.
Petitioner's Exhibit 6.

[In pencil:]

367

1-Cal

1040

INCOME AND SURTAX WAIVER.

 Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, LEON L. MOISE of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said LEON L. MOISE for the year 1918, under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

LEON L. MOISE,

Taxpayer.

State of California,

City and County of San Francisco,—ss.

On this fourth day of January, in the year One Thousand Nine Hundred and twenty-four, before me, J. D. BROWN, a Notary Public in and for said

City and County, residing therein, duly commissioned and sworn, personally appeared Leon L. Moise, known to me to be the person described in, whose name is subscribed to and who executed the annexed instrument and ..he.. acknowledged to me that ..he.. executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of
San Francisco, State of California.

Rooms 206-7 Humboldt Bank Building

Phone Douglas 2324

My commission expires April 4, 1926.

[77] EXHIBIT No. 2 (Front).

[In pencil:]

367

1-Cal

1040

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, LEON L. MOISE of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said LEON L.

MOISE for the year 1918, under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

LEON L. MOISE,
Taxpayer.

By:

D. H. BLAIR,
Commissioner.

PETITIONER'S EXHIBIT No. 7.

[78] EXHIBIT No. 3. (Front)

U. S. Board of Tax Appeals. Div. ——. Docket 7453, 54, 55, 8036. Admitted in Evidence May 4, 1927. Petitioner's Exhibit 7.

IT:PA:4.

GWF:406.

San Francisco, Jan. 30, 1925.

INCOME AND PROFITS TAX WAIVER.

(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws Mr. Gerald Schlesinger, a taxpayer of 171 Palm Ave., San Francisco, Cal., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year(s) 1918, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any

assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

GERALD F. SCHLESINGER,
Taxpayer.

.....

Date.

Approved Mar. 25, 1925.

D. H. BLAIR,
Commissioner of Internal Revenue.

O. K.—C. C. W.

3/25/25

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[79] EXHIBIT No. 3. (Back)

[Stamped:]

Received

Feb. 5, 1925.

Personal Audit Division

PETITIONER'S EXHIBIT No. 8.

[80] EXHIBIT No. 4. (Front)

U. S. Board of Tax Appeals. Div. ——. Docket 7453, 54, 55, 8036. Admitted in Evidence May 4, 1927. Petitioner's Exhibit 8.

San Francisco, Jan. 30, 1925.

IT:PA:4.

GWF:406.

INCOME AND PROFITS TAX WAIVER.

(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws Mr. Gerald Schlesinger, a taxpayer of San Francisco, Calif., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the years(s) 1919, under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31,

1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

GERALD F. SCHLESINGER,
Taxpayer.

.....
Date

Approved Mar. 25, 1925.

D. H. BLAIR,
Commissioner of Internal Revenue.

1918—

1919—

O. K.—C. C. W.

3/25/25

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[81] EXHIBIT No. 4. (Back)

[Stamped:]

Received

Feb. 5, 1925.

Personal Audit Division

PETITIONER'S EXHIBIT No. 9.

[82] EXHIBIT No. 5. (Front)

U. S. Board of Tax Appeals. Div. ——. Docket
—-. Admitted in Evidence May 4, 1927. Petitioner's Exhibit 9.

[In pencil:]

654

1 Ill.

1040

Sep. 25, 1924.

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, GERALD F. SCHLESINGER of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said GERALD F. SCHLESINGER for the year 1918 under the Revenue Act of 1921, or under prior in-

come, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

GERALD F. SCHLESINGER,

Taxpayer.

409 E. 50th St.

State of California,

City and County of San Francisco,—ss.

On this fourth day of January in the year One Thousand Nine Hundred and twenty-four, before me, J. D. BROWN, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared Gerald F. Schlesinger, known to me to be the person. . . described in, whose name is subscribed to and who executed the annexed instrument and. .he..acknowledged to me that. .he..executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Seal]

J. D. BROWN,

Notary Public in and for the City and County of
San Francisco, State of California.

Rooms 206-7 Humboldt Bank Building

Phone Douglas 2324

My commission expires April 4, 1926.

[83] EXHIBIT No. 5. (Front)

[In pencil:]

654

1 Ill.

1040

Sep. 25, 1924.

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, GERALD F. SCHLESINGER of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said GERALD F. SCHLESINGER for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

GERALD F. SCHLESINGER,

Taxpayer.

409 E. 50th St.

Chi., Ill.

By:

.....,

Commissioner.

D. H. BLAIR,

Commissioner.

[84] EXHIBIT No. 5—(Back).

[Stamped:]

Perso

Sep. 30, 1924.

Received

RESPONDENT'S EXHIBIT "A."

[85] EXHIBIT No. 6. (Front)

U. S. Board of Tax Appeals. Div. ——. Docket 7453, 54, 55, 8036. Marked for Identification May 4, 1927. Respondent's Exhibit "A."

[In pencil:]

467

1 Cal.

1040.

22:PA:4.

GWF—406.

Addl. tax \$414.99.

M. R.

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, LE ROY SCHLESINGER of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collec-

tion of the amount of income and surtaxes due under any return made by or on behalf of the said LE ROY SCHLESINGER for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

LeROY SCHLESINGER,
Taxpayer.

State of California,
City and County of San Francisco,—ss.

On this fourth day of January, in the year One Thousand Nine Hundred and twenty-four, before me, J. D. BROWN, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared LeRoy Schlesinger, known to me to be the person...described in, whose name is subscribed to and who executed the annexed instrument and..he..acknowledged to me that..he..executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the City and County of San Francisco, the day and year last above written.

[Seal]

J. D. BROWN,
Notary Public in and for the City and County of
San Francisco, State of California.

Rooms 206-7 Humboldt Bank Building
Phone Douglas 2324

My commission expires April 4, 1926.

[86] EXHIBIT No. 6. (Front)

22:PA:4.

GWF—406.

Addl. tax \$414.99.

M. R.

[In pencil:]

467

1 Cal.

1040.

INCOME AND SURTAX WAIVER.

Date

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, LE ROY SCHLESINGER of San Francisco, California, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income and surtaxes due under any return made by or on behalf of the said LE ROY SCHLESINGER for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits or war-profits tax acts. This waiver expires March 1, 1925.

LeROY SCHLESINGER,
Taxpayer.

By,
.....,

Commissioner.
D. H. BLAIR,
Commissioner.

[87] EXHIBIT No. 6. (Back)

[Stamped:]

Personal Audit No. 4.

Sep. 19, 1924.

Received.

RESPONDENT'S EXHIBIT "B."

[88] EXHIBIT No. 7 (Front).

U. S. Board of Tax Appeals. Div.—. Docket 7453, 54, 55, 8036. Admitted in Evidence May 4, 1927. Respondent's Exhibit "B."

IT:PA:4.

GWF:406.

February 3, 1925.

INCOME AND PROFITS TAX WAIVER.

(For taxable years ended prior to March 1, 1921.)

In pursuance of the provisions of existing Internal Revenue Laws Mr. Leon M. Moise, a taxpayer of San Francisco, Cal., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year(s) 1919 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1925, and shall then expire except that if a notice of a deficiency in tax is sent to said taxpayer by registered mail before

said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

LEON L. MOISE,
Taxpayer.

.....
Date

Approved March 25, 1925.

D. H. BLAIR,
Commissioner of Internal Revenue.

O. K.—C. C. W.

3/25/25.

If this waiver is executed on behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

[89] EXHIBIT No. 7. (Back)

[Stamped:]

Received

Feb. 9, 1925

Personal Audit Division

Personal Audit No. 4

Feb. 9, 1925

Received

Now, March 1, 1930, the foregoing Statement of Evidence and Exhibits certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[90] Filed Feb. 12, 1930. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 7453.

LEON L. MOISE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of United States Board of Tax Appeals:

You will please prepare and before the tenth day of February, 1930, transmit and deliver to, and file with, the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit copies duly certified of the following documents:

1. The docket entries of all proceedings before United States Board of Tax Appeals in the above-entitled cause;

2. All pleadings before the Board of Tax Appeals, including any exhibits attached thereto;

3. Order for consolidation of appeals designated Docket Nos. 7453, 7454, 7455 and 8036;

4. The findings of fact, opinion and decision of said Board promulgated in said cause on September 25, 1928;

5. The order of redetermination by said Board in said cause;

6. Order dated June 17, 1929, *in re* filing of amended petitions or amendments to petitions;

[91] 7. The petition for review to United States Circuit Court of Appeals for the Ninth Circuit with notice of filing showing service on counsel for the respondent;

8. All orders enlarging time for preparation of the evidence and certification of the record to the Circuit Court of Appeals for the Ninth Circuit;

9. Statement of the evidence;

10. This praecipe for the record.

The foregoing to be prepared, certified and transmitted as required by law and the Rules of the United States Circuit Court of Appeals for the Ninth Circuit.

Dated — day of ———, 1930.

J. S. Y. IVINS,
Associate Counsel for Petitioner.

Receipt and due service of a copy of the above and foregoing praecipe is hereby acknowledged this 11th day of February, 1930.

C. M. CHAREST,
General Counsel, Bureau of Internal Revenue,
Attorney for Respondent and Appellee.

Now, March 1, 1930, the foregoing praecipe and proof of service certified from the record as a true copy.

[Seal]

B. D. GAMBLE,
Clerk, U. S. Board of Tax Appeals.

[Endorsed]: No. 6179. United States Circuit Court of Appeals for the Ninth Circuit. Leon L. Moise, Petitioner, vs. David Burnet, Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed July 1, 1930.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.